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THE ADJUDICATION OF GENOCIDE: GACACA AND THE ROAD TO RECONCILIATION IN RWANDA

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INTRODUCTION

In 1994, Rwanda suffered one of the worst genocides in history. During 100 days of killing, 800,000 people died.[2] More people died in three months than in over four years of conflict in Yugoslavia; moreover, the speed of killing was five times faster than the Nazi execution of the Final Solution.[3] Unlike the killings that occurred during the Holocaust, Rwandans engaged in "a populist genocide," in which many members of society, including children, participated in killing their neighbors with common farm tools (the most popular was the machete).[4] While not all Hutus engaged in killing and not all victims were Tutsi, Hutus executed the vast majority of the killings and Tutsis were largely the target of their aggression.[5]

Fourteen years after the genocide, Rwanda is still struggling with how to rebuild the country and handle the mass atrocities that occurred. During the first four years following the genocide, four types of courts developed to prosecute genocidaires:[6] the International Criminal Tribunal of Rwanda, foreign courts exercising universal jurisdiction, domestic criminal courts, and a domestic military tribunal. Regrettably, none of these courts has been able to resolve the enormous problems related to adjudicating genocide suspects. In 2001, the government created gacaca, a fifth system for prosecuting genocidaires, to solve the problems it saw in the other courts. Gacaca is highly lauded by the government and many outside observers as the solution to Rwanda's genocide. A researcher, who studied two gacaca pilot programs for five months, noted that "[t]he official discourse is so

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2. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 156 (University Press of Kansas 1999).

3. *Id.* at 164, 166.

4. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 361-63 (2002).

5. *Id.* at 365.

6. A term generally used to refer to perpetrators of Rwanda's genocide. *See, e.g.*, YVES BEIGBEDER, JUDGING CRIMINAL LEADERS: THE SLOW EROSION OF IMPUNITY 102 (Martinus Nijhoff 2002).

passionate about gacaca and its anticipated outcome that the system is almost granted a mythical status."[7]

Unfortunately, gacaca cannot fully operate as either a court or a customary dispute resolution mechanism because of its twin goals: retribution and reconciliation. Moreover, Rwanda's limited resources and the astounding number of suspects require enormous revisions to gacaca. This paper explores why Rwanda implemented gacaca, the reasons for gacaca's failure and possible solutions for moving forward. Part I presents an overview of the history of ethnic tension in Rwanda, the events leading up to genocide, and the genocide itself. Part II examines the four courts created before gacaca to adjudicate genocide, their failures in the eyes of the Rwandan government and international observers, and the government's creation of gacaca. Part III explores the goals of the Rwandan gacaca model, and whether they are attainable or desirable. Part IV examines gacaca courts' failure to implement criminal procedure protections. Part V suggests revisions to the current adjudication of genocide suspects, including an alternative model of gacaca. Additionally, this section highlights the importance of addressing Rwandans' economic struggles, as a necessary element of reconciliation. Part VI concludes the article.

I. HISTORICAL OVERVIEW OF RWANDA

Disagreement among Rwandans on critical aspects of the nation's history continues to be a major impediment to reconciliation. The Organization of African Unity remarks that "there are hardly any important aspects of the story that are not complex and controversial; it is almost impossible to write on the subject without inadvertently oversimplifying something or angering someone."[8] One of the most controversial issues is the origin of ethnic groups in Rwanda.[9] Before the genocide, the ethnic make-up of Rwanda was 85% Hutu, 14% Tutsi, and 1% Twa.[10] Although these ethnicities were clearly defined, it is unclear how they developed.[11] Since the end of genocide, the government has promoted a version of history in which Tutsi and Hutu peacefully co-existed before colonialism.[12] The government's official website claims that "[w]hile the relationship between the king and the rest of the population was unequal, the relationship between the ordinary Bahutu, Batutsi and Batwa[13] was one of mutual benefit mainly through

7. Arthur Molenaar, *Gacaca: Grassroots Justice After Genocide. The Key to Reconciliation in Rwanda?*, 77 AFR. STUD. CENTER RES. REP. 1, 68 (2005), *available at* https://openaccess.leidenuniv.nl/dspace/bitstream/1887/4645/1/ASC-1236144-071.pdf.

8. Daly, *supra* note 4, at 358 (quoting AFRICAN UNION, RWANDA: THE PREVENTABLE GENOCIDE – INTERNATIONAL PANEL OF EMINENT PERSONALITIES ¶ 2.1 (2000), *available at* http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf).

9. *Id.* at 359.

10. BALL , *supra* note 2, at 156.

11. Daly, *supra* note 4, at 359-60.

12. *Id.* at 359.

13. Bahutu, Batutsi, and Batwa are the terms traditionally used by Rwandans to identify the ethnic groups within their country. These terms, when adopted by the West, became Hutu, Tutsi and Twa and refer to the same ethnic groups. *See, e.g.*, WOMEN FOR WOMEN INTERNATIONAL, RWANDA FACTSHEET (2005), http://www.womenforwomen.org/downloads/country_factsheet_rwanda_sunday.pdf.

the exchange of their labour. The relationship was symbiotic."[14] However, many Hutus believe that Tutsi herders were foreigners to Rwanda who considered themselves superior to the Hutu pastoralists and took control of the region between the eleventh and fifteenth century.[15] The failure of the Tutsi-controlled government to address the Hutu version of history further highlights the significant ideological split between Tutsis and Hutus. Hutus and Tutsis view themselves as different ethnic groups, even though they share the same language (Kinyarwanda), culture, clan names, customs, taboos, and have intermarried for centuries.[16] The government has avoided confronting these conflicting beliefs between ethnic groups and has banned the use of ethnic categories because it is afraid of inflaming ethnic tensions.[17] However, the government's lack of healthy outlets in society for Rwandans to face these differences and resolve them has forced these tensions to erupt in courtrooms and gacaca. Since 1994, no history lessons have been taught in Rwandan schools because no consensus exists on the past, and government publications refuse to include an ethnic breakdown of society.[18]

Whether or not the ethnic divisions began in pre-colonial times, they were exploited during colonialism. Colonists considered Tutsis to be the missing link between blacks and whites because many Tutsi were lighter skinned, thinner, and taller than the Hutus.[19] As a result, Tutsis were placed in positions of authority over Hutus. In 1935, Belgian colonists introduced ethnic identity cards ("tribal cards") to Rwandans.[20] Ironically, these cards provided the lists of Tutsis to be targeted for killing during the genocide.[21] Prior to the introduction of identity cards, Hutus could become Tutsis with the acquisition of cattle; however, ethnic identity cards ended this practice.[22] For the majority of the colonial period, up until 1959, Tutsis dominated local government and the educational arena.[23] In 1959, Hutus forcibly took power following the death of the Tutsi monarch, killing Tutsis and forcing many others into exile.[24] By 1962, when Belgium granted independence to Rwanda, Hutus controlled the government and more than 200,000 Tutsis were in exile.[25]

Since independence, there have been several power struggles between Hutus and Tutsis, including a series of massacres that occurred in 1963, 1964, 1973,

14. Official Website of the Republic of Rwanda: History, http://www.gov.rw/ (last visited Feb. 27, 2007).

15. Daly, *supra* note 4, at 360.

16. BALL, *supra* note 2, at 156; Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1, 8 (2005).

17. Marian Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, 60(1) J. INT'L AFF. 199, 202, 207 (2006).

18. Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 AFR. J. LEGAL STUD. 29, 41, 48 (2004).

19. Raper, *supra* note 16, at 6-7.

20. *Id.* at 7, 9.

21. *Id.* at 10.

22. *Id.* at 9-10.

23. BALL, supra note 2, at 159.

24. *Id.*

25. *Id.*

1990, 1992, and 1993.[26] In August 1993, Hutus and Tutsis signed the Arusha Peace Accord and appeared to reach a power sharing agreement.[27] The United Nations (UN) Security Council sent 2,500 UN troops to Rwanda to monitor the treaty.[28] Although peace seemed near to the outside world, as early as January 1994, Major General Romeo Dallaire, UN commander in Rwanda, notified the UN that the Hutu government planned to exterminate the Tutsis.[29] On April 6, 1994, the airplane of President Juvenal Habyarimana, a Hutu, was shot down and genocide began within the hour.[30] Rather than increasing the number of soldiers, as requested by Major General Dallaire, the UN withdrew troops, leaving 270 UN soldiers in Rwanda under a mandate only to "monitor" the situation.[31] Over the next three months 800,000 people died in the genocide.[32]

II. A RWANDAN PERSPECTIVE ON THE FOUR COURTS ESTABLISHED TO ADJUDICATE GENOCIDE

A. The International Criminal Tribunal for Rwanda (ICTR)

Shortly after the genocide, the Rwandan government requested the help of the UN to form an international tribunal to prosecute genocide suspects because there were hardly any lawyers or judges in the country.[33] In November 1994, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR).[34] The UN based its authority to create the ICTR on Chapter VII of the UN Charter.[35] The ICTR has the power to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states."[36] The jurisdiction of the ICTR extends to individuals[37] suspected of committing genocide, crimes against humanity, and violations of Article 3

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26. Raper, *supra* note 16, at 13.

27. BALL, *supra* note 2, at 162.

28. *Id.*

29. *Id.* at 163.

30. *Id.* President Habyarimana's plane was shot down by two ground-to-air-missiles. There are two competing theories of responsibility for the plane crash. One version is that radicals within Habyarimana's regime shot the president's plane down because they were unhappy with a peace agreement that would give rebels a stake in the government. *Id.* Alternatively, others claim that Paul Kagame and other Tutsi rebels shot the president's plane down because they knew that the power sharing agreement that called for multiparty elections would not place Tutsis in power since they were only fifteen percent of the population. In November 2006, this theory was supported by French Judge Jean Louis Bruguiere who accused Paul Kagame of participating in the assassination of Habyarimana. Stephen Kinzer, *The France-Rwanda Affaire*, LOS ANGELES TIMES, Dec. 18, 2006, at Bus. Sec., *available at* 2006 WLNR 21960974; *The Heat Turns on Kagame*, THIS DAY (Nigeria), Nov. 26, 2006, *available at* 2006 WLNR 20647387.

31. BALL, *supra* note 2, at 163-64.

32. *Id.* at 155-56.

33. *Id.* at 171, 183. The dearth of lawyers and judges is attributable to the deaths of many of these practitioners and the destruction of their offices and supplies during the genocide.

34. BEIGBEDER, *supra* note 6, at 104.

35. JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 465 (2d ed. 2000).

36. *Id.* at 474 (quoting Article 1 of the Statute of the International Criminal Tribunal for Rwanda).

37. The ICTR doesn't have jurisdiction over groups or organizations. *See id.* at 500.

common to the Geneva Conventions and of Additional Protocol II.[38] Although the Rwandan government initially supported formation of the international tribunal, Rwanda was the only member of the UN Security Council to vote against the ICTR.[39]

There are several reasons why Rwanda voted against the ICTR. One of its main objections was the ICTR's lack of a death penalty.[40] The Rwandan government feared that the masterminds of the genocide would receive prison terms, while subordinates and lower-ranked perpetrators, found guilty in national court, would receive the death penalty.[41] Second, the government was not in favor of the limited temporal jurisdiction of the tribunal to handle incidents that occurred between January 1, 1994 and December 31, 1994.[42] The Rwandan government was unhappy with the ICTR's time frame because genocide planning began in 1990.[43] Third, the government wanted the ICTR to have the power to prosecute groups and organizations responsible for promulgating the genocide, rather than its limited ability to prosecute only "natural persons."[44] Lastly, the government felt strongly that the ICTR should be located within Rwanda, rather than in Arusha, Tanzania.[45]

In April 1998, Rwanda issued a formal position paper to the UN entitled *The Position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR).*[46] The government criticized the ICTR for poor organization, personnel problems, lack of a prosecutorial and investigation strategy, poor conduct in investigations (failure to investigate some of the areas where the worst atrocities were committed), and poor prosecutorial conduct.[47] In conclusion, the Rwandan government requested implementation of the following recommendations: (1) an independent prosecutor for Rwanda;[48] (2) moving the ICTR to Kigali, Rwanda; (3) strengthening the power of the prosecutorial staff; (4) hiring more qualified staff; and (5) improving cooperation between the ICTR and

38. BEIGBEDER, *supra* note 6, at 105.

39. *Id.* at 104.

40. *Id.*

41. *Id.*

42. BALL, *supra* note 2, at 171-72.

43. *Id.*

44. *Id.* at 172.

45. Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEXAS: NOVEMBER 6-7, 2003 33, 35
(Steven R. Ratner and James L. Bischoff eds., 2004).

46. BALL, *supra* note 2, at 172.

47. *Id.* at 172-73.

48. Before September 15, 2003, the ICTR and the International Criminal Tribunal for Yugoslavia (ICTY) shared a prosecutor. *See* Press Release, ICTR, *The New Prosecutor of the ICTR Mr. Jallow Takes Up His Mandate* (Oct. 6, 2003) *available at* http://www.pict-pcti.org/news_archive/03/03Oct/ICTR_100603.htm.

the Rwandan government.[49] The UN Security Council did not comply with any of these requests.[50]

Many Rwandans remain unaware of the ICTR because of its distance from Rwanda and its limited impact on everyday citizens,[51] but for those Rwandans who are familiar with the tribunal, the relationship between the ICTR and Rwanda remains strained. Martin Ngoga, Rwanda's Deputy Attorney General and representative to the ICTR for four years, echoes a common belief of many Rwandans that "[t]he tribunal was not created to get justice, but to nurse the guilt of the international community."[52] Additionally, Rwandans have come to see the ICTR as a drain on international resources that could be better used within the country.[53]

By September 2004, the ICTR had resolved only twenty-three cases, even though investigations had begun ten years earlier.[54] Over two years later, in December 2006, the ICTR had convicted twenty-six people and acquitted five people.[55] It was estimated that the ICTR would spend over 1 billion dollars prosecuting approximately forty genocidaires in the period from 1995 through 2007.[56] However, by the end of 2007, only 35 accused had been tried.[57]

In addition to the limited number of people prosecuted, the UN has planned for the ICTR to complete its mandate by the end of 2008.[58] This completion strategy has led the ICTR to begin the process of transferring some of its cases to the national courts of several countries, including Rwanda.[59] This decision is

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49. BALL, *supra* note 2, at 173.

50. *Id.*

51. Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 47 (2005).

52. Dele Olojede, *A People's Court,* NEWSDAY, May 4, 2004, http://www.pulitzer.org/year/2005/international-reporting/works/olojede7.html.

53. Gerald Gahima, Secretary-General of the Ministry of Justice, stated that if Rwanda had 1/20 of the money given to the ICTR, many of Rwanda's problems would be solved. *See* BEIGBEDER, *supra* note 6, at 104.

54. Raper, *supra* note 16, at 27.

55. Andrew England, *FT Report-Rwanda: Putting Faith in the Young. Reconciliation: The Next Generation Need to Be Brought Up As Agents of Peace*, FINANCIAL TIMES (London), at 5, Dec. 5, 2006.

56. *Id.*

57. Hirondelle News Agency, *ICTR Review- Tough Year Ahead for ICTR as Completion Strategy Approaches,* HIRONDELLE PRESS AGENCY, Dec. 31, 2007, http://www.hirondelle.org/arusha.nsf/English?OpenFrameSet

58. *Id.*

59. *Id.* Several human rights groups oppose the transfer of ICTR cases to Rwanda, even though Rwanda has abolished the death penalty, which was one of the initial objections people had to adjudicating cases in Rwanda. Amnesty International urged the ICTR not to transfer cases to Rwanda until it has demonstrated that: (1) "the Rwandan justice system can operate impartially by investigating and prosecuting crimes by all sides;" (2) "the Rwanda justice system will conduct trials in accordance with international fair trial standards;" (3) "trials of any person transferred to Rwanda [will] be observed by independent experts to ensure that they are fair;" (4) "persons transferred to Rwanda for trial are not at risk of torture or subjected to other cruel, inhuman or degrading treatment;" and (5) "[v]ictims and witnesses [will] receive protection and support." Amnesty Int'l, *Rwanda: Suspects Must Not be Transferred to Rwandan Courts for Trial Until it is Demonstrated that Trials will Comply with*

somewhat surprising because the UN created the ICTR based on the premise that an international tribunal outside of Rwanda was the best method for adjudicating the worst perpetrators of genocide.[60] Additionally, this decision possesses an element of irony because, when the ICTR began, the Rwandan government's request to prosecute these cases in Rwanda was denied.

The majority of Rwandans are dissatisfied with the tribunal because it is slow and expensive, it provides perpetrators of genocide more rights and amenities than victims (i.e. comfortable living space and anti-retroviral drugs for HIV infection), and it remains removed and out of reach for local Rwandans.[61]

B. Domestic Criminal Courts

In response to the ICTR's limited temporal and subject matter jurisdiction, as well as to the slow speed of the ICTR, Rwanda passed Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990. The law enables Rwanda's criminal courts to prosecute all individuals who committed genocide, crimes against humanity, or crimes associated with them.[62] Unlike the ICTR, people may be prosecuted in domestic courts for crimes committed between October 1, 1990 and 1994.[63] Organic Law No. 08/96, before its amendment in 2004 (due to the introduction of a new gacaca law), classified suspects into four categories: (1) leaders and organizers of the genocide, notorious murderers, and those who committed sexual torture; (2) all others responsible for "intentional homicide or of serious assault against the person causing death"; (3) persons who committed serious assaults, but did not kill anyone; and (4) persons who committed property damage.[64] Ironically, the ICTR limits the power of the national court because it possesses superseding jurisdiction.[65] This limitation may prevent Rwanda from trying some Category 1 suspects because a person prosecuted by the ICTR may not be tried before a national court for the same violations of international law.[66] Although the domestic court answers several critiques the Rwandan government had of the ICTR, the biggest obstacle to the national court system has been the slow speed of trials. The Rwandan government acknowledges that:

International Standards of Justice, AI Index AFR 47/013/2007, Nov. 2, 2007.

60. Jason Strain and Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide, in* ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 87, 98-99 (Jane Stromseth ed., 2003).

61. Drumbl, *supra* note 51, at 46-48.

62. Organic Law No. 08/96 on the Organization of Prosecution for Offences constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990,, Aug. 30, 1996, art. 1, *available at* http://www.preventgenocide.org/law/domestic/rwanda.htm.

63. *Id.*

64. *Id.* at Art. II.

65. JONES, *supra* note 35, at 502 (referencing Article 8 Concurrent Jurisdiction of the Statute of the International Criminal Tribunal for Rwanda).

66. *Id.* at 504 (quoting Article 9 Non-bis-in-idem of the Statute of the International Criminal Tribunal for Rwanda).

> [T]he sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda's criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda's prisons are heavily congested, and the cost of feeding and clothing prisoners is a drain on the economy.[67]

Additionally, the government estimates that it would take 200 years, at the present rate, to prosecute everyone in the traditional court system.[68] As of January 2002, only 1,989 suspects had been brought to trial,[69] and a year and a half later, in August 2003, only 6,500 people had been tried.[70] Considering that over 135,000 suspects had been detained in prisons, these numbers were very low.[71] This prosecutorial lethargy was attributable to the judicial system's devastation during genocide, including the departure or death of most lawyers, judges, and judicial personnel and the destruction of offices, supplies and transportation.[72] Moreover, the slow speed of the criminal courts had created horribly overcrowded prisons.[73] Prior to 1994, detention facilities had a limited capacity to hold only 18,000 people.[74] Since the end of genocide, new prisons have been built, and old ones expanded, but they have only increased prison holding capacity to 51,000 people.[75] In a country greatly depleted of financial resources and in need of massive physical rebuilding, the imprisonment of such a large percentage of the population is a tremendous burden economically, socially, and psychologically.

In addition to Rwandans' displeasure with the domestic courts' speed of adjudication, a number of citizens dislike the courts' due process procedures because they render much important evidence inadmissible.[76] Moreover, some Rwandans view the requirement that victims testify, subjecting themselves to cross-examination, as harmful because it forces victims to relive their traumas.[77] Particularly disconcerting is the distrust among Hutus of the Tutsi-controlled legal system, which hinders the development of a reliable record of the past and harms

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67. Daly, *supra* note 4, at 369.

68. Official Website of the Republic of Rwanda, *supra* note 14; *but see, e.g.*, Drumbl, *supra* note 51, at 45; Zorbas, *supra* note 18, at 36. These sources more conservatively estimate that it would take more than a century to prosecute all suspects in the traditional court system.

69. BEIGBEDER, *supra* note 6, at 115.

70. Drumbl, *supra* note 51, at 45.

71. BALL, *supra* note 2, at 183.

72. *Id.* In 2000, there were only sixty lawyers in private practice in Rwanda and few wanted to represent genocide suspects. Even if there were enough lawyers to represent everyone, the country could not afford to pay for their representation. REPUBLIC OF RWANDA, REPLY TO AMNESTY INTERNATIONAL'S REPORT: RWANDA: THE TROUBLED COURSE OF JUSTICE (2000) http://www.gov.rw/government/06_11_00news_ai.htm. (last visited March 20, 2008) [hereinafter Republic of Rwanda, *Reply*].

73. *Id.*

74. *Id.*

75. *Id.*

76. Drumbl, *supra* note 51, at 51-52.

77. *Id.*

the reconciliation process.[78] For the above reasons, many Rwandans and international observers are displeased with the domestic courts.

C. The Military Tribunal of Rwanda

Although Organic Law No. 08/96 appears to apply to all Rwandans, "the Military Tribunal tries in the first instance all offences committed by all Military personnel irrespective of their rank."[79] The tribunal also possesses "powers to try Military personnel accused of the crime of genocide and crimes against humanity committed in Rwanda between October 1, 1990 and December 31, 1994, that place them in the first category irrespective of their ranks."[80] Therefore, military personnel benefit because the government protects them from prosecution in both the criminal courts and gacaca.

Members of the Rwandan Patriotic Front (RPF)[81] receive preferential treatment because "the RPF is the party in power, [hence] its armed forces are considered military personnel retroactively, whereas the armed forces and militia of the Habyarimana regimes are considered *genocidaires*."[82] As a result of their privileged status, even though the RPF engaged in the killing of an estimated twenty-five thousand to forty-five thousand Hutu civilians during and after the genocide, hardly any RPF members have been prosecuted.[83] As of late 2002, the military court had tried only twenty cases of "vengeance killings" in which an RPF member was accused of participating in Hutu revenge killings.[84] More shocking was the fact that the chief military prosecutor had no more open files on the 1994 war crimes by November 2002.[85] While the Rwandan government, which is primarily controlled by Tutsis, has no problem with these distinctions,[86] other Rwandans believe "[t]his furthers the notion of victor's justice as those in the RPF,

78. Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice,* 2004 J. DISP. RESOL. 355, 375 (2005).

79. Organic Law No. 07/2004, Determining the Organisation, Functioning and Jurisdiction of Courts, April 25, 2004, art. 138, *available at* http://www.kituochakatiba.co.ug/jurisdictionofcourts.htm.

80. *Id.; see also Constitution of the republic of Rwanda*, arts. 154-55 (June 4, 2003*), available in French at* http://www.grandslacs.net/doc/2729.pdf (stating that the military tribunal has jurisdiction over crimes committed by members of the military).

81. The Rwandan Patriotic Front is a group of Tutsi exiles that formed on October 1, 1990 to combat the Hutu controlled government of President Habyarimana. *E.g.*, Marie Béatrice Umutesi, *Is Reconciliation Between Hutus and Tutsis Possible?*, 60 J. INT'L AFF. 157, 157 (2006).

82. Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda,* 8 AFR. STUD. Q. 57, 70 Fall 2004.

83. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,* 79 TEMP. L. REV. 1, 59-60 (2006).

84. *Id.* at 60.

85. *Id.*

86. The RPF has not only alienated itself from the Hutu population of Rwanda, but also from many Tutsis. This is because many of the RPF who grew up as Tutsi exiles in foreign countries learned to speak English rather than French, which has caused a strained relationship with Rwanda's Francophone Tutsi population. Some of the complaints Tutsis have voiced since the genocide are: (1) the reintegration of suspected genocidaires into government and the military; (2) the government's public display of bones and corpses to memorialize the genocide; and (3) the lack of reparations for survivors. *Id.* at 37.

as Tutsis, will not stand trial against accusations from primarily Hutu communities."[87]

D. Foreign Tribunals of Universal Jurisdiction

A handful of Rwandans have been tried in Switzerland and Belgium based upon the implementation of universal jurisdiction.[88] In 1999, Switzerland tried a former Rwandan mayor and found him guilty of grave breaches of the Geneva Convention.[89] It became the first nation to employ its domestic courts to judge a case where neither the perpetrator nor the victims were citizens of the nation and where the crime occurred outside the country's borders.[90] Following Switzerland, Belgium convicted four Rwandans of violations of the Geneva Convention.[91] However, in 2003, Belgium amended its universal jurisdiction law, severely limiting its reach, but preserving one Rwandan case that had already begun.[92] In 2005, that case led to the trial of two Rwandan businessmen implicated in mass murder.[93] Although these trials have gained international attention, their impact in Rwanda has been extremely limited because they affect only a handful of Rwandans living in exile in the countries that choose to prosecute.[94]

III. THE GACACA COURTS

A. Historical Development of Gacaca

Given the problems with the ICTR and the national courts, on October 17, 1998, the Rwandan president, in conjunction with officials and citizens, established a commission to expedite justice and increase public participation in the process.[95] On June 8, 1999, the Commission published a proposal for gacaca.[96] Legislation enacting gacaca passed on January 26, 2001.[97] Gacaca, in Kinyarwandan (the local language), means "the grassy lawn," and it refers to a traditional dispute resolution mechanism used by communities in Rwanda.[98] The government turned to gacaca as an alternative to the traditional courts because of citizens' familiarity with the system and its ability to engage all Rwandans in the

87. Tiemessen, *supra* note 82 at 70.

88. William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39, 47 (2003) [hereinafter Schabas, *National Courts*].

89. *Id.*

90. Human Rights Watch, *Rwanda: Belgian Genocide Trial*, Apr. 12, 2001, http://hrw.org/press/2001/04/rwanda-trial.htm. [hereinafter Human Rights Watch, *Rwanda*].

91. Schabas, *National Courts*, *supra* note 88.

92. Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed,* Aug. 1, 2003, http://hrw.org/English/docs/2003/08/01/ belgiu6280.htm [hereinafter Human Rights Watch, *Belgium*].

93. Associated Press, *Two on Trial for Rwanda Genocide*, THE GUARDIAN (London), May 10, 2005, *available at* http://www.guardian.co.uk/world/2005/may/10/rwanda.

94. *See* Human Rights Watch, *Rwanda, supra* note 90.

95. Raper, *supra* note 16, at 33.

96. *Id.* at 33-34.

97. *Id.* at 34.

98. Goldstein-Bolocan, *supra* note 78, at 355 n.1.

process of accounting for a genocide that involved mass societal participation.[99] National implementation of gacaca began in 2006.[100]

Rwanda designed gacaca to work in combination with the national criminal courts by enabling gacaca to handle crimes committed between October 1, 1990 and December 31, 1994, and by adopting the same four categories of genocide suspects as contained in Organic Law 08/96.[101] Category 1 suspects (leaders and organizers of the genocide, notorious murderers, and those who committed sexual torture) continued to face prosecution in the criminal courts, while suspects in Categories 2, 3, and 4 were within gacaca's jurisdiction.[102]

In October 2001, over 260,000 judges were elected from the community[103] to preside over 10,000 gacaca jurisdictions.[104] Beginning in 2002, a two year pilot phase of gacaca commenced, in which only 751 jurisdictions operated.[105] At the end of the pilot phase, in June 2004, the law's complexity and system inefficiency led lawmakers to revise gacaca.[106] The current gacaca law contains only three categories of suspects: Category 1 remains the same; Category 2 combines all perpetrators and accomplices of murder and other violent crimes; and Category 3 applies to those suspected of property offenses.[107] The law establishes a three-tiered court system: the Cell handles Category 3 crimes, the Sector handles Category 2 crimes, and the Gacaca Court of Appeal handles appeals from those sentenced in absentia or sentenced by the Sector.[108] Furthermore, the law reduces the number of judges required at the Cell level from nineteen to fifteen, and lowers the overall number of judges required from 260,000 to 170,000.[109] Despite the

99. National Service of Gacaca Jurisdictions, Context or Historical Background of Gacaca Courts,http://www.inkiko-gacaca.gov.rw/En/Generaties.htm (last visited Mar. 23, 2008) [hereinafter *Historical Background*].

100. Godwin Agaba, *Gacaca Courts to Change Structure,* THE NEW TIMES (Kigali), Jan. 7, 2007, *available at* http://www.rwandagateway.org/article.php3?id_article=3978.

101. *See* Organic Law, No. 40/2000, Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, Jan. 26, 2001, arts. 3 & 51, *available at* www.inkiko-gacaca.gov.rw/pdf/Law.pdf.

102. *Id.* at arts. 2, 39-42. Originally gacaca had four jurisdictions, arranged hierarchically like the court system, to handle the various levels of suspects: the Cell handled Category 4 crimes; the Sector handled Category 3 crimes; the District handled Category 2 crimes; and the Province handled appeals of sentences from the District and sentences rendered in absence of the accused.

103. BEIGBEDER, *supra* note 6, at 115.

104. Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda,* 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 174 (2005).

105. Goldstein-Bolocan, *supra* note 78, at 380.

106. *Id.* at 378.

107. *See* Organic Law, No. 16/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, June 19, 2004, art. 51, *available at* www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf [hereinafter, *Organic Law, No. 16/2004*].

108. *See id.* at arts. 41-43.

109. *See id.* at art. 13; William A. Schabas, *Genocide Trials and Gacaca Courts,* 3 J. INT'L CRIM. JUST. 879, 894 (2005) [hereinafter Schabas, *Genocide Trials*].

2004 reduction in the number of judges necessary for gacaca, low judicial participation has led the Executive Secretary of the National Service of Gacaca Jurisdictions (NSGC), Domitille Mukantanganzwa, to propose a law in parliament to further reduce the number of judges required by almost half.[110] Notwithstanding the major changes NSGC has made to gacaca law, many Rwandans remain skeptical of gacaca's ability to provide an effective method to adjudicate genocide suspects.

B. The Objectives of Gacaca

The government instituted gacaca to achieve the following five objectives: (1) "[t]o reveal the truth about what has happened;" (2) "[t]o speed up the genocide trials;" (3) "[t]o eradicate the culture of impunity;" (4) "[t]o reconcile the Rwandans and reinforce their unity;" and (5) "[t]o prove that Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom."[111]

From the government's perspective, these goals are fundamental to effective adjudication of genocide suspects. The government continues to champion gacaca as a success,[112] even though gacaca has hardly achieved the five objectives it purports to address. Rather than generating solutions, gacaca has created more problems for Rwandan society to solve, which forces people to question whether the government is addressing the right goals with gacaca and whether the objectives it has established can be achieved through the current gacaca system.

1. To Reveal the Truth About What Has Happened

The official Rwandan government website states that "justice can become true only if the truth about events is established."[113] The government asserts that gacaca will forward the process of uncovering the truth by providing eyewitnesses the opportunity to speak about the genocide and by developing lists of individuals in each community who were genocide victims or participants.[114] Unlike traditional criminal trials, in which the goal is to prosecute an individual for the crimes he committed against the state and where the focus of the trial remains on the defendant, gacaca focuses on the effect of the suspect's actions on the community and invites testimony from every person affected by the crime. Moreover, each local community has its own gacaca tribunal, increasing the chances of societal participation in the justice process by enabling convenient access to hearings.

While there is real potential for gacaca to provide a more complete picture of what transpired during genocide, the search for truth is rife with obstacles. One of the most lauded aspects of gacaca is the plea bargaining system. The system

110. Agaba, *supra* note 100.

111. National Service of Gacaca Jurisdictions, The Objectives of the Gacaca Courts, http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm (last visited April 20, 2008) [hereinafter *Objectives*].

112. *See, e.g.*, Official Website of the Republic of Rwanda, *supra* note 14.

113. *Objectives*, *supra* note 111.

114. *Id.*

provides for a 50% reduction in prison time for Category 2 suspects who confess during gacaca.[115] Additionally, if a person confesses prior to his gacaca hearing, his sentence may be reduced by up to two thirds.[116] A valid confession requires a suspect to provide a detailed description of the committed offenses, reveal all accomplices in the crime, and publicly apologize for the offense.[117]

Although public confessions could lead to uncovering the truth, the majority of confessions made in pilot programs have not provided full disclosure of people's participation in the genocide.[118] Requiring suspects who confess to incriminate their accomplices pressures some suspects into falsely accusing others.[119] However, the most common problem is that almost all confessors admit to only one or two minor crimes and blame third parties for the more serious crimes.[120] This is done to avoid harsher sentences, placement in Category 1, and adjudication in the criminal courts.[121] Even those who admit to murder minimize their involvement in the genocide.[122] Gabriel Gabiro, a Rwandan journalist, states, "I've never heard anybody confessing to more than one murder. You'd think nobody in Rwanda killed twice."[123] It is estimated that between 250,000 and 500,000 women were raped during the genocide;[124] however, out of 1,881 confessions made in the province of Ginkogoro, no one confessed to rape, a Category 1 crime.[125]

Similar to the disincentives suspects possess for complete confession, witnesses face pressure not to disclose what they have seen. Rather than encouraging observers of genocide to come forward and testify, gacaca has silenced many of them because they too face criminal liability for failing to render assistance to genocide victims.[126] Several survivors believe that people talked more openly about the genocide prior to gacaca, when they did not fear jail time.[127]

In addition to rapists refusing to confess and witnesses refusing to come forward, the victims of rape are highly unlikely to testify.[128] A 2002 study, by the Rwandan Unity and Reconciliation Commission, found that 60% of sexual abuse survivors forecasted that women would testify much less than men because of the

115. *Organic Law No. 16/2004*, *supra* note 107, at art. 73.

116. Ali Mao, *Traditional Justice*, NEW VISION (UGANDA), Dec. 9, 2006, *available at* 2006 WLNR 21382971.

117. *Organic Law No. 16/2004*, *supra* note 107, at art. 54.

118. Molenaar, *supra* note 7, at 72-73.

119. Zorbas, *supra* note 18, at 36-37.

120. Molenaar, *supra* note 7, at 140.

121. *Id.*

122. *See* Stephan Faris, *Open Court*, 165 TIME EUROPE 12, Mar. 21, 2005, *available at* http://www.time.com/time/printout/0,8816,1037615,00.html.

123. *Id.*

124. Wells, *supra* note 104, at 182.

125. Molenaar, *supra* note 7, at 115.

126. Waldorf, *supra* note 83, at 81. The 2001 gacaca provision, which provided immunity to bystanders from criminal liability, was deleted in the 2004 gacaca law.

127. Molenaar, *supra* note 7, at 74.

128. Wells, *supra* note 104, at 187.

intimate nature of the crime.[129] According to Gaudelive Mukasavais, a Rwandan social worker:

> At first women who were raped used to testify, but nowadays they don't want to because nothing happened after their testimony. No one helped them. That's why it is difficult to tell these women that they should tell it to their neighbors during Gacaca, neighbors who have no training and who cannot help them with their trauma. We tell them to testify but most are not willing.[130]

While many survivors worry that if they tell the truth they might suffer violence, ostracism or counter-allegations that they committed crimes, the risks of testifying for rape survivors are much higher.[131] In Rwanda, rape victims fear they will become ineligible to marry and will face ostracism from their families and husbands.[132] Frequently, parents refuse to allow young girls to testify because of a commonly held belief that discussing sexual abuse will only worsen ethnic tension and harm the reconciliation process.[133]

Victims are also reluctant to testify because they fear for their own safety.[134] To reduce the fears associated with testifying, gacaca judges possess the ability to imprison anyone who threatens or pressures a witness not to testify.[135] In March 2004, fourteen people were sentenced to death and three to life imprisonment for killing survivors expected to testify in gacaca.[136] However, this has not stopped the threatening or killing of survivors and witnesses. Between July and December 2006, there were at least 16 killings and 24 attempted killings of witnesses.[137] Several of the murdered individuals were executed with machete,[138] the same farm tool used to carry out the genocide.

The biggest challenge to obtaining the truth is getting both sides to participate and believe in gacaca. While a Johns Hopkins survey found that 87% of the population was willing to provide evidence in gacaca,[139] this statistic is unreliable

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129. *Id.*

130. Internews Rwanda, *Child of Rape: Child of Genocide,* Apr. 2005, *available at* http://www.internews.org.rw/articles7.htm#child.

131. Wells, *supra* note 104, at 186-88.

132. *Id.*

133. *Id.*

134. Goldstein-Bolocan, *supra* note 78, at 391.

135. *See Organic Law, No. 16/2004*, *supra* note 107, at art. 30. These prison sentences can range from three months to two years.

136. Goldstein-Bolocan, *supra* note 78, at 392.

137. Karen McVeigh, *Spate of Killings Obstructs Rwanda's Quest for Justice,* THE OBSERVER, Dec. 3, 2006, at 41, *available at* http://www.guardian.co.uk/world/2006/dec/03/rwanda.karenmcveigh. One particularly gruesome story is of Martin Havugivaremye who testified in front of gacaca. When Mr. Havugivaremye was attacked with machetes he called out for help, but no one in his village would assist him because he had given the names of killers in gacaca. These murders have also been perpetrated against gacaca judges.

138. *Id.*

139. SIMON GASIBIREGE AND STELLA BABALOLA, PERCEPTIONS ABOUT GACACA LAW IN RWANDA: EVIDENCE FROM A MULTI-METHOD STUDY 14 (Johns Hopkins Univ. Sch. of Pub. Health, Ctr. for Commc'n Programs, 2001).

because although people's words support gacaca, their actions do not.[140] In two pilot programs studied, only genocide survivors accused people of committing crimes, with one exception.[141] Initially, Hutus in both communities remained silent during gacaca hearings.[142] However, in Gatovu, as gacaca progressed, the Hutu population began defending the accused, fighting with survivors and calling them liars.[143] In Vumwe, Hutus stopped going to assemblies and by the end of the observation, only 10% of the community attended hearings.[144] Throughout fifteen cases, only seventeen people in the community testified, other than the defendants.[145]

The government's control over gacaca further obstructs the process of uncovering a truthful version of the genocide because the government forwards its own version of truth and ignores voices in the community.[146] Because the majority of the government is run by the RPF (the group of Tutsis responsible for ending genocide), massacres performed by the Rwandan Patriotic Army (RPA) (the military wing of the RPF) are not addressed in gacaca, even though gacaca law enables adjudication of crimes against humanity.[147] As a result, many Hutus and outside observers believe gacaca is a form of victor's justice, portraying all Hutus as perpetrators of genocide and all Tutsis as faultless victims.[148] This one-sided version of the genocide is only capable of providing half-truths.

Another obstacle to discovering the truth is many villagers' fundamental lack of trust in gacaca, which has led some of them to abuse the gacaca system by using the pretence of genocide accusations to settle land disputes and family feuds.[149] "By failing to provide an adequate forum for hearing property disputes, the government may have unwittingly encouraged people to try to resolve those disputes through false accusations of genocide in gacaca."[150] Even without purposeful deception, many survivor accounts are inaccurate because survivors were hiding or fleeing and did not witness the event in question, or because they no longer have a clear memory of the event due to the trauma they suffered during genocide.[151]

While gacaca has expanded the opportunities for truth and healing by enabling survivors to share their stories and by requiring suspects to give confessions to detail their crimes, it has had limited success. Gacaca is unable to

140. Molenaar, *supra* note 7, at 73-74.

141. *Id.* at 105.

142. *Id.* at 105-06.

143. *Id.* at 106.

144. *Id.* at 103.

145. *Id.* at 106.

146. *See* Tiemessen, *supra* note 82, at 58.

147. *Id.* at 69-70.

148. *See id.* at 67-69.

149. Paul Willis, *No Lawyers but Rwanda's Village Courts Could Pass Death Sentence,* SUNDAY TELEGRAPH (UK), Apr. 9, 2006, *available at* 2006 WLNR 5967489. In the Ginkongoro province, a man was falsely accused of rape during gacaca because he owed the alleged victim's family money.

150. Waldorf, *supra* note 83, at 72.

151. *Id.* at 71.

produce truthful accounts of the past because both suspects and victims are reluctant to invest in the system.

2. To Speed Up the Genocide Trials

When gacaca began, the government guaranteed that gacaca would speed up the adjudication of genocide suspects because, rather than having only twelve specialized courts, the country would have 11,000 gacaca jurisdictions to handle genocide crimes.[152] However, during the first six years of gacaca, it appeared that it was no better equipped than the criminal courts to quicken the pace of adjudication.

Although gacaca passed into law in January 2001, elections for gacaca judges did not begin until October of 2001.[153] The first pilot program began in June of 2002 with twelve gacaca jurisdictions.[154] By November, 2003, there were only 750 pilot programs,[155] even though the government's plan would eventually lead to the creation of 12,100 gacaca courts.[156] On March 10, 2005, the first pilot gacaca programs finally moved from the investigative stage (involving collection of data and categorization of crimes) to the trial stage.[157] The first four months of trials from March 10, 2005 to June 30, 2005 produced only 1,950 judgments.[158] Finally, in mid-July 2006, gacaca courts were extended to the whole country.[159]

At the end of October 2006, it appeared that it would take many years to conclude gacaca because the National Service of Gacaca Jurisdictions (NSGC) estimated that there were 766,489 genocide suspects whose cases had not been adjudicated.[160] However, on December 19, 2006, the Rwandan Minister of Justice, Mr. Tharcisse Karugarama, declared that the gacaca tribunals would conclude by the end of 2007.[161] This appeared to be an unrealistic goal because at the beginning of 2007, approximately 40,000 accused had been tried in gacaca courts.[162] Additionally, the mandatory weekly gacaca meetings were placing an

152. The Republic of Rwanda, *supra* note 14.

153. Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L CRIM. JUST. 896, 914 (2005).

154. Schabas, *Genocide Trials*, *supra* note 109, at 894.

155. *Id.* at 893-94.

156. England, *supra* note 55.

157. *See Gacaca: Prime Minister Testifies*, INTERNEWS: RWANDA ARTICLES, Apr. 2005, http://www.internews.org.rw/articles7.htm#prime.

158. Hirondelle News Agency, *Rwanda/Gacaca- Over 2000 Cases Completed by Gacaca Courts*, HIRONDELLE PRESS AGENCY, Sept. 7, 2005, http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/8B6CF68B52AFF9F4432570750021D6A8?OpenDocument.

159. Agaba, *supra* note 100.

160. *Id.* Of these suspects, 72,539 of them were placed in Category 1 and were to receive criminal trials; whereas, the 397,103 suspects in Category 2 and the 296,847 in Category 3 were to receive gacaca hearings.

161. Hirondelle News Agency, *Rwanda: Rwanda/Gacaca- Conclusion of Gacaca Trials Next Year (Rwandan Minister of Justice)*, HIRONDELLE PRESS AGENCY, Dec. 20, 2006, http://www.hirondellenews.com/content/view/34/26/ [hereinafter, Hirondelle, *Conclusion of Gacaca Trials*].

162. *See id.*

economic strain on both community members[163] and judges[164] and it appeared that gacaca courts could not sustain their current pace of adjudication. Furthermore, rather than decreasing the number of genocide suspects, gacaca resulted in a huge increase in suspects.[165]

Despite the factual data from 2006 that pointed to an end date for gacaca many years into the future, on November 19, 2007, the President of Rwanda, Paul Kagame, announced that gacaca would conclude at the end of 2007.[166] Miraculously, according to the National Service of Gacaca Courts (SNJG), more than 800,000 suspects had been tried in gacaca courts by the end of 2007.[167] The remarkable speed with which the gacaca courts operated in 2007 is almost unbelievable. Gacaca proceedings remain poorly documented, leaving it difficult to ascertain how so many cases were resolved in such a short amount of time. However, it is clear that this radically quickened pace of adjudication raises concerns regarding whether the courts exercised procedural fairness and engaged in sufficient community participation.

Regardless of the President's statement that gacaca would conclude at the end of 2007, gacaca continues in 2008.[168] According to Domitille Mukantanganzwa, approximately 15% of Category 3 suspects and 3% of Category 2 suspects are still awaiting hearings by the gacaca courts.[169] Additionally, it is possible that gacaca courts will begin trying Category 1 genocide suspects.[170] Currently, the Rwandan government's plan is to devote 2008 to completing gacaca.[171]

Although gacaca began very slowly, the Rwandan government kept its promise to speed up the genocide trials. While the Rwandan government may see this as a triumph, it is difficult to imagine that a country with a population of

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163. Hirondelle News Agency, *Stunned by Growing Numbers of Genocide Suspects, Rwanda Revisits Categorisation,* HIRONDELLE PRESS AGENCY, Sept. 7, 2005, http://tj-forum.org/archives/Gacaca%20numbers,%20Oct%2005.html [hereinafter Hirondelle, *Rwanda Revisits Categorisation*].

164. Molenaar, *supra* note 7, at 102. Judges receive no compensation for their participation in gacaca, which has led to the common sentiment, aptly expressed by one judge that, "[i]f you didn't eat, you cannot come to gacaca, but you must go and find some money or food. Should my children or me die because of gacaca? . . . They don't give us anything[.]"

165. Hirondelle News Agency, *Rwanda/Gacaca: Approximately a Million People Have Appeared Before Gacaca Courts*, HIRONDELLE PRESS AGENCY, Dec. 12, 2007, *available at* http://www.hirondellenews.com/content/view/1357/461/. The Rwandan government now estimates that around one million people participated in the genocide and require gacaca hearings. This greatly increased number of suspects is the result of gacaca's confession system which requires all genocidaires to name their accomplices. *See* Schabas, *Genocide Trials, supra* note 109, at 881.

166. President Paul Kagame, Address at the ACP-EU Parliamentary Assembly in Kigali (Nov. 19, 2007), *available at* http://www.acp-eu.gov.rw/index.php?iro=news&obj=39&details=235.

167. Hirondelle News Agency, *Rwanda: Controversial Assessment of the Gacaca Courts*, HIRONDELLE PRESS AGENCY,Jan. 3, 2008, http://www.hirondellenews.com/content/view/1394/309/.

168. *See id.*

169. Hirondelle News Agency, *Rwanda: Gacaca Trials Could Also Try First Category Defendants*, HIRONDELLE PRESS AGENCY, Jan. 4, 2008, *available at* http://www.hirondellenews.com/content/view/1406/474/.

170. *Id.*

171. *Id.*

approximately 9 million people[172] was able to fairly adjudicate over 700,000 genocide suspects in one year[173] when only 40,000 had been tried in the previous six years.[174] The decision to adjudicate so many suspects in such a short amount of time may ultimately prove to be an unwise choice.

3. To Eradicate the Culture of Impunity

Many Rwandans believe that a culture of impunity exists in Rwanda because perpetrators of prior massacres in the country received impunity.[175] Some Rwandans believe that if this culture of impunity did not exist, the 1994 genocide would not have occurred.[176] The government claims to support an end to the culture of impunity:

> In their cells, the citizens will play an important role in the reconstruction of the facts and in the accusation of those who perpetrated them. None of those who took part in them will escape punishment. Thus, people will understand that the infringement implies the punishment for the criminal without exception.[177]

Rwanda has been successful at punishing Hutu genocidaires because the country has refused to grant amnesty to most suspects and gacaca provides prison sentences for any genocide participant who committed a more severe crime than property damage. However, the government has not truly ended impunity because of its refusal to try RPA soldiers responsible for committing crimes against humanity. Additionally, crimes that the government acknowledges RPA soldiers have committed are tried behind closed doors in front of a military tribunal run by their peers.[178] Without publicly addressing the crimes committed by both sides, gacaca is little more than victor's justice.

4. To Reconcile the Rwandans and Reinforce Their Unity

The government believes that gacaca will unify the nation by producing truth.[179] As the government explains, once "the truth will be known, there will be no more suspicion, the author will be punished, justice will be done to the victim and to the innocent prisoner who will be reintegrated into Rwandan society."[180] Unfortunately, gacaca is unable to produce a completely truthful version of the genocide; and successful reconciliation will require much more than the truth.

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172. U.S. DEP'T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: RWANDA, June 2007, *available at* http://www.state.gov/r/pa/ei/bgn/2861.htm [hereinafter *Background Note: R.wanda*].

173. Hirondelle, *Rwanda Revisits Categorization supra* note 163.

174. Hirondelle, *Conclusion of Gacaca Trials supra* note 161.

175. Stephanie Wolters, *The Gacaca Process: Eradicating the culture of impunity in Rwanda?* INSTITUTE FOR SECURITY STUDIES, Aug. 5, 2005, 12, *available at* http://www.reliefweb.int/library/documents/2005/iss-rwa-05aug.pdf.

176. *Id.*

177. *Objectives, supra* note 111.

178. *See* Tiemessen, *supra* note 82, at 61-68.

179. *Objectives, supra* note 111.

180. *Id.*

There is much scholarly debate over defining reconciliation. To require "apology and forgiveness and the willingness to embark on a new relationship based on acceptance and trust"[181] as part of reconciliation, may automatically prevent its achievement because in a society that has experienced such mass atrocity, these goals may be unachievable. Professor Louis Kreisberg provides a more practical definition of reconciliation, one that Rwandans can realistically achieve: "Reconciliation refers to the process by which parties that have experienced an oppressive relationship or destructive conflict with each other move to attain or to restore a relationship that they believe to be minimally acceptable."[182] Kreisberg's definition of reconciliation accurately reflects most Rwandans' view of reconciliation, as "the way to overcome a history of conflict and to rebuild better social relations in which people cooperate, share meals, and drink beer together."[183] For Rwandans to cooperate, to share food and drink, and to forward national reconstruction, they must achieve "minimally acceptable" social relations.[184]

Sadly, reconciliation remains a distant hope. In pilot studies, gacaca created more divisiveness than communal bonds.[185] Many survivors perceive confessions by genocide suspects as insincere,[186] promoting resentment between Hutus and Tutsis rather than reconciliation. As Klaas de Jonge, a monitor of gacaca for Penal Reform International, stated, "[t]he accused think because they ask for forgiveness, they are entitled to forgiveness. You hear these people confessing as if they are describing a movie. There's absolutely no compassion."[187] Although genocide suspects are the ones on trial, many survivors feel that the community is judging them. As explained by one survivor, "the population dislikes you and says that you accuse people of their family. When I encounter them on the road, they ignore me.... Even when I want to buy beer for other people, they will refuse because they are afraid that I will poison them."[188] While many survivors experience community ostracism, many perpetrators are afraid of community responses to their actions during genocide.

An increasing problem, not documented until 2005, has been a string of suicides and suicide attempts by genocide suspects.[189] Between March and the end

181. Molenaar, *supra* note 7, at 32 (quoting Wendy Lambourne, *Justice and Reconciliation: Postconflict Peacebuilding in Cambodia and Rwanda, in* RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 322 (Mohammed Abu-Nimer ed., 2001)).

182. *Id.* at 31 (quoting Louis Kreisberg, *"Changing Forms of Coexistence", in* RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE, 47-64, 48 (Mohammed Abu-Nimer ed., 2001)).

183. *Id.* at 33.

184. In traditional gacaca, drinking of beer together was an aspect of reconciliation, in which the losing party was required to provide beer to the community. Waldorf, *supra* note 83, at 49.

185. Molenaar, *supra* note 7, at 91.

186. Waldorf, *supra* note 83, at 73.

187. *Id.* (quoting Interview with Klaas de Jonge, Penal Reform International, in Kigali, Rwanda (Sept. 2002)).

188. Molenaar, *supra* note 7, at 134.

189. Craig Timberg, *Suicides Slow Search for Justice, Closure in Rwanda,* THE WASHINGTON POST, Feb. 17, 2006. Front, *available at* 2006 WLNR 2911892. Some means by which genocide suspects have killed or attempted to kill themselves include hanging oneself, ingestion of pesticide, and

of December, 2005, sixty-nine suspects killed themselves and forty-four others attempted suicide.[190] Some genocide survivors view the suicides as dashing their hopes for closure.[191] Benoit Kaboyi, executive director of Ibuka, the largest association of genocide survivors, expresses a commonly held sentiment of survivors, that "[n]o person has the right to punish themselves.... They [perpetrators] have to suffer for what they have done."[192] Citizens' anger toward suspects, who killed themselves, rather than truthfully accounting for their participation in the genocide, is a further impediment to reconciliation.

Reconciliation is a long process that may take decades or generations to achieve. However, it has been fourteen years since the genocide, and post-gacaca Rwanda still lacks signs that the country is moving toward unity. Rwandans must recognize the following if they want successful reconciliation: (1) different people have very different understandings of reconciliation; (2) reconciliation only occurs if the two parties can openly discuss their differences and accept the reconciliation process; and (3) reconciliation cannot be achieved until a society has peace and personal security.[193] Unfortunately, none of these factors have been properly addressed by the Rwandan government.

Due to the government's top-down implementation of gacaca, members of society had no influence over the goals of gacaca or discussions concerning reconciliation and its significance to different groups within Rwanda. Reconciliation has been difficult to achieve because there is no mutually held understanding of what it means. When Rwandans were asked to define elements of reconciliation, their answers varied widely, from confession and forgiveness, the release of innocent prisoners, justice and uncovering the truth, to holding both Tutsis and Hutus responsible for their crimes.[194]

Another obstacle to reconciliation is gacaca's failure to produce full disclosure of the truth. Inability to fully and openly discuss the genocide prevents reconciliation because Hutus and Tutsis remain skeptical of each other. Furthermore, Rwandans do not fully accept the gacaca process because their participation is mandated by the state and they face criminal sanctions if they refuse to comply.[195] Gacaca lacks credibility because it is not an accurate representation of traditional gacaca and many Rwandans perceive it to be a foreign system thrust upon their communities.[196] Additionally, many Hutus do not accept the reconciliation process because it is government controlled, which has resulted in a failure to address Tutsi crimes.[197]

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swimming in crocodile infested water.

190. *Id.*

191. *Id.*

192. *Id.*

193. Molenaar, *supra* note 7.

194. *Id.* at 29.

195. *See Id.*; *Organic Law No. 16/2004*, *supra* note 107, at art. 29.

196. Goldstein-Bolocan, *supra* note 78, at 392. For a discussion of the difference between traditional and modern gacaca, *see infra* pp. 28-30.

197. *Id.* at 390.

Furthermore, although the genocide is over, many people do not feel personally secure. Continued violations of human rights in prisons, and the anger of many Hutus toward the government's imprisonment of them and/or their family without trial (or even charges for some)[198] makes the Rwandan majority unwilling to trust the reconciliation process. These Hutus fear that gacaca's retributive emphasis will result in more prison time for them or their loved ones.

Lastly, there is little incentive for Rwandans to invest in the designated reconciliation process. Although gacaca promises to provide victims with financial compensation from the accused,[199] no compensation has been provided.[200] While the government's plea bargaining system requires perpetrators who confess to perform community service, it has not created adequate measures to monitor people's performance of this service.[201] When 1,676 people were asked what they perceived the major current problems were in Rwanda, 81.9% of them identified poverty/economic hardship as a main concern.[202] Without providing victims with material benefits through compensation or community service, there exists little reason to invest in gacaca. Reconciliation remains possible for Rwandans; however, it is unattainable under the current gacaca system.

5. To Prove That Rwandan Society Has the Capacity to Settle Its Own Problems Through a System Based on the Rwandan Custom

Allegedly, gacaca reflects the historical dispute resolution mechanism employed for centuries in Rwanda. However, other than a shared name, modern gacaca barely resembles traditional gacaca. Traditionally, Rwandans used gacaca to resolve minor disputes, such as land/property disputes and petty thefts.[203] Gacaca had no written rules and was conducted on an *ad hoc* basis when disputes arose.[204] Reconciliation was the primary focus of gacaca; therefore, sentences were purely compensatory[205] and could not be imposed without acceptance by both parties.[206] The system inflicted penalties on the entire family of the accused because gacaca was based on an assumption of collective responsibility.[207] Customarily, elder male heads of family acted as arbitrators and women were excluded from the process.[208] Gacaca shunned the use of law to resolve conflicts and deemed confessions to be a form of provocation.[209] Voluntary participation by

198. Molenaar, *supra* note 7, at 71.

199. *Organic Law No. 16/2004*, *supra* note 107, art. 95.

200. Molenaar, *supra* note 7, at 47.

201. Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 55 (2002).

202. GASIBIREGE AND BABALOLA, *supra* note 139, at 7.

203. Goldstein-Bolocan, *supra* note 78, at 376-77.

204. Molenaar, *supra* note 7, at 13.

205. *Id.* at 14.

206. Jennifer G. Riddell, Addressing Crimes Against International Law: Rwanda's Gacaca in Practice 48 (2005) (unpublished L.L.M. thesis, University of Aberdeen) (available at http://www.restorativejustice.org/resources/docs/ridelljennifer).

207. Molenaar, *supra* note 7, at 14.

208. Fierens, *supra* note 153, at 913; Molenaar, *supra* note 7, at 12.

209. Fierens, *supra* note 153, at 913.

members of society was crucial to gacaca and to resolving local disputes based on the best interests of the community.[210]

The only key feature of modern gacaca that remains similar to traditional gacaca is a highly accessible system, based on community participation.[211] Otherwise, the modern gacaca framework barely resembles its namesake. All people over twenty-one years of age, regardless of their gender, can now serve as judges and participate in the gacaca process.[212] Modern gacaca is a legal institution that meets at regularly scheduled intervals, no longer provides flexibility, and does not allow individual communities the independence to select their method of implementing dispute resolution.[213] Rather than using social pressure to convince members of society to participate in the process, modern gacaca relies on the coercive power of the state.[214] Punishment is legislated by the state, not based on compromise between the parties involved.[215] Additionally, gacaca now focuses on retribution and judges possess the ability to imprison individuals.[216] Furthermore, while traditional gacaca disdained confessions, modern gacaca promotes plea bargaining as an effective tool for discovering the truth.[217]

One of the government's central justifications for gacaca is that it empowers communities to adjudicate crimes perpetrated by community members against their neighbors.[218]However, the make-up of the communities that existed during genocide has greatly changed. One reason for the change has been the influx of approximately 750,000 Tutsi exiles into Rwanda after the genocide and the exodus of many Hutus.[219] Additionally, Rwanda's villagization program has relocated hundreds of thousands of people into new villages from hillside farms.[220] These people were not a community during genocide and may not feel connected to each other.[221] While a central goal of traditional gacaca was to restore communities to their condition before the conflict, it is impossible for modern gacaca to do this because many of these communities never existed.

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210. Maureen E. Laflin, *Gacaca Courts: The Hope For Reconciliation in the Aftermath of the Rwandan Genocide*, 46 ADVOC. (IDAHO) 19, 20 (2003).

211. Molenaar, *supra* note 7, at 24.

212. *Id.*

213. *Id.* at 25.

214. *See* Waldorf, *supra* note 83, at 68 (explaining that methods the State has employed to coerce participation in gacaca include threatening fines and imprisonment to people who were absent from gacaca, closing up shops and rounding people up for gacaca, and preventing people from leaving once a session begins).

215. Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 NO. 3 HUM. RTS. BRIEF 15, 17 (2001).

216. Molenaar, *supra* note 7, at 25.

217. Fierens, *supra* note 153, at 913.

218. *See* Donald L. Hafner Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Could and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 105-06 (2007).

219. Daly, *supra* note 4, at 379-80.

220. *Id.* at 378.

221. *Id.*

IV. THE NEED FOR CRIMINAL PROCEDURE PROTECTIONS FOR CRIMINAL DEFENDANTS IN GACACA COURTS

Several scholars have shied away from using the word court to refer to gacaca because it lacks many of the due process protections that courts provide, and because traditional gacaca was solely an arbitration system. However, the Rwandan government refers to "Gacaca Courts,"[222] and the law implementing gacaca confirms that "Gacaca Courts have competences similar to those of ordinary courts...."[223] Like court systems, gacaca's organization is hierarchical; it has the power to summon witnesses, issue search warrants, confiscate goods, pronounce prison sentences, and consider appeals.[224]

The Rwandan government labels gacaca a court, it functions like a court, and most importantly, it possesses the power of a court to imprison individuals.[225] Therefore, if the government wants gacaca to operate as a court, it should follow the due process requirements of a court, as enumerated in domestic law and the international and regional treaties to which Rwanda subscribes. Failure to do so weakens gacaca in the eyes of the local populace and the international community. The Rwandan government agrees, and has stated, "[w]e acknowledge that Gacaca jurisdictions are tribunals to which the international human rights instruments, to which Rwanda is a party, apply."[226] Despite this recognition by the government, gacaca violates several fair trial procedures provided for by international and domestic law.

Rwanda joined the International Covenant on Civil and Political Rights (ICCPR) in 1975, the African [Banjul] Charter on Human and People's Rights (African Charter) in 1983, and signed the Arusha Peace Accord in 1993, which incorporated the Universal Declaration of Human Rights (UDHR) into domestic law.[227] Domestically, Rwanda provides for fair trial standards in the Rwandan Code of Criminal Procedure (CCP). The ICCPR, African Charter, UDHR and CCP all recognize an accused's right to defense counsel.[228] However, in gacaca, the accused are not entitled to counsel. Additionally, the ICCPR and the CCP guarantee defendants the right to cross-examine adverse witnesses and call witnesses in their own defense, neither of which is provided for in gacaca.[229] The

222. *Historical Background, supra* note 99.

223. *Organic Law No. 16/2004, supra* note107, at art. 39.

224. *Id.* at arts. 39, 41-43.

225. *Id.* at art. 39; *Historical Background, supra* note 99.

226. The Republic of Rwanda, *Reply, supra* note 72, at § X, E.

227. Werchick, *supra* note 215, at 16 (summarizing from the Arusha Peace Accord, Art. 17 which states, "the principles enshrined in the Universal Declaration of Human Rights of the 10th of December 1948 shall take precedence over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former.").

228. *See* International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), art. 14(3)(b, d), U.N. Doc. A/6316 (Dec. 16, 1966); African [Banjul] Charter on Human and People's Rights, June 26, 1981, 21 I.L.M. 58, art. 7; Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), art. 11(1), U.N. Doc. A/810 (Dec. 10, 1948); Werchick, *supra* note 215, at 16 (citing the Rwandan Code of Criminal Procedure (CCP) art. 75(1)).

229. *See* ICCPR, *supra* note 228, at art. 14(3)(e); Werchick, *supra* note 215, at 16 (citing CCP art.

government allows the prosecutor access to witnesses in developing the evidentiary record before a hearing, but defendants do not have access to witnesses or their files prior to hearings.[230] This appears to violate the ICCPR provision that a defendant is entitled "to have adequate time and facilities for the preparation of his defense."[231]

Key to the UDHR, ICCPR, and African Charter is the guarantee of an impartial and independent tribunal.[232] Gacaca law requires judges to be "Rwandans of integrity" with "high morals and conduct," who have not participated in genocide or crimes for which they received a sentence of over six months.[233] Despite these requirements, judicial impartiality and independence remain questionable because judges are members of the community, they experienced genocide themselves, and some have very strong biases. Gacaca judges receive only six days of training[234] and no compensation for their work.[235] Large numbers of poorly trained, unpaid judges threaten impartiality because judges are ripe for corruption[236] and manipulation. Moreover, judicial impartiality clearly does not exist in all gacaca locations because 14,885 gacaca judges have been charged with genocide.[237]

Furthermore, the ICCPR and the African Charter guarantee a right to appeal to a higher tribunal.[238] However, in gacaca all appeals are handled within the gacaca courts and under no circumstances reach the criminal courts. As a result of gacaca's violations of fair trial standards, enumerated in the ICCPR and African Charter, the appeal system is inadequate.[239]

To counter accusations of international law violations, Rwanda claims that it is complying with international treaties, and points to Article 4 of the ICCPR, which states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the

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76(6)).

230. Werchick, *supra* note 215, at 17.

231. ICCPR, *supra* note 228, at art. 14(3)(b).

232. UDHR, supra note 228, at art. 10; ICCPR, *supra* note 228, at art. 14(1); African [Banjul] Charter on Human and People's Rights, *supra* note 228, at art. 7 & 26.

233. *Organic Law No. 16/2004*, *supra* note 107, at art. 14..

234. BEIGBEDER, *supra* note 6, at 115.

235. Bolocan, *supra* note 78, at 387.

236. *Id.* at 388.

237. Hirondelle News Agency, *Rwandan/Gacaca- Over 14,000 Gacaca Judges Charged with Genocide*, HIRONDELLE PRESS AGENCY, Sept. 13, 2005, http://www.hirondelle.org/arusha.nsf/English?OpenFrameSet.

238. ICCPR, *supra* note 228, at art. 14(5); African [Banjul] Charter on Human and People's Rights, *supra* note 228, at art. 7(1)(a).

239. Ironside, *supra* note 201, at 54.

> exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law....[240]

While the categorization of this situation as an "emergency" is debatable, Article 4 explicitly prevents derogation of responsibilities that are inconsistent with Rwanda's other international legal obligations. Despite the Rwandan government's acceptance that Article 4 applies to Rwanda, the country still does not provide the fair trial guarantees provided by international and domestic law. Since gacaca functions as a court, and adjudicates cases with criminal sanctions, the rules Rwandans agreed to internationally and domestically should apply.

V. LOOKING FORWARD: REVISING GACACA AND RWANDA'S GOALS FOR THE FUTURE

At the outset of gacaca many scholars supported the system because they believed it was better than the alternatives. The ICTR was limited to only a select few Rwandans; those identified as the masterminds of the genocide. The criminal justice system, which originally intended to prosecute all genocide suspects (not tried by the ICTR), was incapable of timely prosecution. Scholars supported gacaca, even though it was rife with due process violations, because they believed in its potential to promote reconciliation.[241] Unfortunately, the past seven years, since gacaca's inception, demonstrate that gacaca is a failure because of several flaws in the system's design and because of its failure to address the economic struggles of Rwandans. There is a need for new solutions that address both the prosecution of genocidaires and the re-growth of the economy.

A. Fundamental Flaws of Gacaca and Proposals for a New System of Justice

There are several problems with the current gacaca system. One problem is that the government promotes gacaca as both a traditional dispute resolution system and a court; it simultaneously attempts to provide criminal retribution and reconciliation.[242] However, it achieves neither of these goals successfully. The uncomfortable blend of reconciliation and retribution has alienated many Rwandans from the process.

Since its inception, the government has failed to critically examine gacaca. Instead of acknowledging the many signs in 2006 that gacaca was not successfully leading to truth finding and reconciliation, the government decided in 2007 to radically speed up the adjudication process in an effort to complete gacaca by the end of that year. When gacaca could not be completed in 2007, the government agreed to extend the process into 2008.

In addition to its goal of concluding all Category 2 and Category 3 cases in 2008, the government is entertaining the idea of creating a National Gacaca Court to handle Category 1 suspects.[243] The government has continuously ignored the

240. The Republic of Rwanda, *Reply, supra* note 72.

241. *See* Raper, *supra* note 16, at 48-49.

242. *See id.* at 31.

243. *Genocide/Gacaca- Gacaca Trials Could Also Try First Category Defendants*, *supra* note 169. The government discussed gacaca trying Category 1 suspects as early as 2005. *See* Edwin Musoni,

due process problems inherent in gacaca. These due process violations are the most worrisome aspect of the government's plan to incorporate Category 1 suspects into gacaca because Category 1 suspects are the individuals who committed the most serious high-profile crimes, including mass murder, rape, and torture,[244] and face the highest risks if they are not provided with criminal procedure protections.

Despite the due process concerns, the most disturbing aspect of gacaca remains its failure to relieve ethnic tensions or provide a truthful account of the past. Although the majority of gacaca suspects have now been tried, it is questionable whether they have received a fair and adequate hearing. Rather than continuing on its rushed path toward completion of gacaca by the end of 2008, the government should focus on establishing an appellate process within gacaca and within the criminal court system that enables people who do not feel they received a fair hearing to challenge their conviction. A proper appellate process may lead to many new community hearings where the factual record has been inadequately established or presented in a biased manner. Additionally, rather than continuing to artificially boost a system that many Rwandans view as antithetical to reconciliation, the Rwandan government should alter gacaca to restore community trust in the system.

A new decentralized gacaca system should be established that more closely resembles traditional gacaca. Unlike the current system, which relies on government-generated lists of suspects,[245] local community members should be responsible for bringing cases forward and should be encouraged to name both Hutu and Tutsi suspects who engaged in Category 2 and Category 3 offenses leading up to genocide, during the genocide, and in the months following the genocide, when the RPF took control. The power to imprison individuals should be removed from gacaca in order to promote reconciliation. Rather than RPF-mandated prison sentences, or penalties for genocide suspects, each community should work toward creating its own system of justice for genocide suspects. The elimination of prison sentences would significantly reduce due process concerns and increase the chance that genocide suspects would fully disclose their role in the genocide.

While a more localized form of gacaca is necessary to return people's confidence in the process, abolishing government oversight poses the risk that some communities and suspects will not take gacaca seriously. To prevent Rwandans from feeling that this system perpetuates the culture of impunity, the government should retain records of all Category 2 and Category 3 suspects and these suspects should be informed that if they commit a new offense they may face

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Rwanda: Gacaca Wants to Try Category One Suspects, THE NEW TIMES, Nov. 6, 2005, http://www.afrika.no/Detailed/10791.html (stating that a plan to create a National Gacaca Court is in the draft stage and still needs cabinet and parliament approval).

244. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, RWANDA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm [hereinafter *Rwanda: Country Report*].

245. Musoni, *supra* note 243.

criminal prosecution for any crimes committed during genocide,[246] as well as for their current crimes. Additionally, the government should continue criminal prosecution of Category 1 suspects, the leaders and organizers of the genocide and those who committed acts of rape and sexual torture.[247] To ensure some modicum of impartiality, government trained gacaca judges should continue to oversee the gacaca process in their communities. Furthermore, the government should retain the power to prevent communities from implementing solutions that violate the civil rights of those found guilty. The government may also want to provide communities with suggestions on how to develop their own solutions for resolving cases.

Since the majority of genocide suspects have already been tried in gacaca, any changes to gacaca must be retroactively applied. For people currently serving prison sentences, who were found guilty in gacaca, their sentences should be converted to community service. Each individual's local gacaca should be responsible for determining the type of service that must be performed and overseeing that service. The release of these prisoners into society will have a positive effect on the economy because it will reduce Rwanda's prison costs and it will invigorate Rwanda's workforce. Additionally, the money Rwanda currently allocates to prisons can be given to communities to implement service programs.

B. Gacaca's Failure to Address Rwandans' Economic Hardships and Proposals for How to Include These Concerns in the Future

Rwanda is ranked 158th out of the 175 poorest countries in the world, according to the Human Development Index.[248] It is an extremely poor country in which 90% of its citizens rely on primary agriculture to survive.[249] It is one of the world's most densely populated agrarian societies and has a population of approximately nine million people living in a country smaller than Maryland.[250]

246. The system would function like an unsupervised pre-trial diversion program does in the United States. Charges are re-instituted only if the defendant commits new violating conduct. *See, e.g.*, Pa.R.Crim.P. Rule 318 (2001) (Procedure on Charge of Violation of Conditions of Accelerated Rehabilitative Disposition Program). Because the offenses in question were committed at least fourteen years earlier, and suspects should have an expectation of finality at some point, like the American counterpart, charges should be dismissed after a specified period of time with no new violating conduct. *See, e.g.*, Pa.R.Crim.P. Rule 316(B) (2001) (period of program not to exceed two years); Pa.R.Crim.P. Rule 319 (2001) (providing for dismissal of charges upon successful completion of the program). One exception to this time limitation may be advisable. As is the case, generally, in the United States, homicide charges could potentially be prosecuted at any time. *Cf., e.g.*, 42 Pa.C.S. § 5551 (1990) (generally no time limit for prosecution of homicide cases).

247. *Rwanda: Country Report*, *supra* note 244. Community groups and international donors should pressure the government to expand Category 1 suspects to include military members and Tutsis who participated in the killing of civilians in the months following the genocide.

248. Branch Office Kigali for the United Nations High Commissioner for Refugees, *Country Operations Plan 2007: Rwanda*, UNHCR, Mar. 31, 2006, *available at* http://www.unhcr.org/protect/PROTECTION/44f546c72.pdf [hereinafter *Country Operations Plan*].

249. *Id.*

250. *Background Note: Rwanda*, *supra* note 172; Timberg, *supra* note 189.

The main socio-economic problem is the large population and lack of access to land.[251] Most genocide survivors are extremely poor.[252]

Although the 1996 Genocide Law and the 2001 Gacaca Law called for reparations for victims of genocide, these reparations have never been realized.[253] In 2004, the revised gacaca law deferred the issue of reparations.[254] For survivors there are few options for receiving compensation for their losses. While some criminal courts have awarded compensation to victims from convicted genocidaires, most of these genocidaires are indigent and unable to pay.[255] Moreover, the Rwandan government has immunized itself from civil liability for its role in the genocide.[256] The only government fund for survivors is the Fonds d'Assistance aux Rescapes du Genocide (FARG), which provides the neediest survivors assistance with healthcare and education costs.[257] However, this is not a compensation fund and cannot be accessed by the gacaca or criminal courts to award survivors reparations.[258]

A major impediment to gacaca has been the government's failure to address survivor's financial needs. It is impossible for this small country with limited financial resources to prosecute every individual who participated in genocide. Rather than helping Rwandans to reconcile, gacaca has further divided communities by draining the crucial financial resources[259] necessary for rebuilding Rwanda and for providing reparations to genocide victims. Without economic incentives, many survivors are less inclined to participate in gacaca.[260] Additionally, many Rwandans are reluctant to participate in gacaca as witnesses or judges because it means time away from their economic livelihood.[261]

If the government revises gacaca as suggested, it has the potential to reduce the economic suffering of survivors, which thus far has been ignored. Coerced community participation in gacaca should be eliminated and replaced with incentives created by the community to encourage local participation. Rather than mandatory weekly meetings, in which all members of the community must attend, each community should devise its own schedule for meetings and requirements for community participation. Each village should create an individualized gacaca plan that possesses the power to consider the economic strains particular to its area and

251. *Country Operations Plan, supra* note 248.

252. Waldorf, *supra* note 83, at 56.

253. *Id.*

254. *Id.*

255. *Id.* at 56-57.

256. *Id.* at 57.

257. *Id.* at 57-58. FARG was created by the government in 1998. The government finances the program with 5% of the yearly tax revenues. FARG has experienced scandals involving corruption. In 2002, a draft reparations law was proposed by the Council of Ministers that would increase government funding to 8% of tax revenues and replace FARG, but it has been shelved since then.

258. *Id.* at 57.

259. Waldorf, *supra* note 83, at 85. The government and international donors have spent millions on the incarceration and trials of genocide suspects.

260. *Id.* at 59.

261. Molenaar, *supra* note 7, at 100-02.

to develop community specific solutions. One method of relieving economic stress may be found in communities' creation of penalties for people who have been found responsible for property offenses. Some possible solutions that communities may develop for people found liable for property offenses include community service projects, return of property to its rightful owner, repair of property damaged during genocide, and reparations. These punishments possess the potential to spark economic growth.

Regardless of the possibilities gacaca possesses for empowering Rwandans to change their future and their economy, changing Rwanda's system for adjudicating genocide suspects is only one step in the process of reconciliation. Resources that are no longer needed to detain and prosecute Category 2 and Category 3 suspects should be diverted toward rebuilding the economy, creating support groups for survivors, opening spaces for dialogue between Hutus and Tutsis, and designing education programs that advance reconciliation.

VI. CONCLUSION

The present gacaca system is not succeeding. Rather than bringing Rwandans together, gacaca has proven divisive. Moreover, gacaca violates several fair trial standards established by Rwanda through domestic and international law. In order to successfully reunite and rebuild the nation, major revisions to gacaca are necessary. However, gacaca alone will never solve Rwanda's problems.

Reconciliation is a slow process that may take decades or generations. Whether Rwanda chooses to use national courts, gacaca, amnesty, or some combination of these to tackle the problems associated with the genocide, reconciliation requires more than addressing the question of what to do with the perpetrators. As posed by one genocide survivor, "[h]ow can I forgive, when my livelihood was destroyed and I cannot even pay for schooling for my children?"[262] Reconciliation is not possible without addressing the economic hardship suffered as a result of genocide. Rwandans cannot move forward unless their government addresses the physical, psychological, and social traumas that they suffered. Genocide has not only affected the victims emotionally, it has also affected the entire Rwandan population by causing massive economic upheaval. For too long, the government has focused on the criminal prosecution of genocide suspects. The end of criminal prosecution of Category 2 and Category 3 suspects will greatly increase the resources available for poverty alleviation, job creation, and education. It is now time for the government to place its primary focus on rebuilding the nation.

262. Zorbas, *supra* note 18, at 37.

BEYOND UNCITRAL: ALTERNATIVES TO UNIVERSALITY IN TRANSNATIONAL INSOLVENCY

ALEXANDER M. KIPNIS[1]

The rapid growth of international economic activity in the recent decades has brought forth a unique and formidable policy challenge. The challenge consists of reconciling two goals which sometimes compete directly with one another: creating a regime that allows economic interaction between private actors to occur with the highest possible degree of efficiency, and allowing sovereigns to ensure that the regime does not thwart their public policy to induce those sovereigns' cooperation.

The tension between these competing goals is patently evident in transnational bankruptcies. On one hand, considerations of efficiency call for three things: *ex ante* predictability, elimination of wasteful duplication of work by the courts, and incentives for optimal *ex ante* allocation of resources. On the other hand, any proposed regime must be sufficiently attractive to sovereign actors for adoption, and actually become widely adopted, if it is to become a genuine international regime. To that end, it must allow sovereign actors to satisfy the needs of their own domestic public policy if they are to cooperate.

This paper discusses the need for a comprehensive system for the resolution of transnational bankruptcies. It then examines the various bankruptcy systems that are discussed in the scholarship or implemented in practice in the present day, including the various flavors of territoriality, universality, and contractualism, along with a solution predicated on the establishment of an international body for administering transnational insolvency proceedings. It further addresses the UNCITRAL Model Law on Transnational Bankruptcy and its implementation, in particular, in the United States. It discusses the advantages and disadvantages of each regime and offers thoughts on how each may be improved or tailored to suit various economic needs. The paper concludes by advocating a modified form of cooperative territoriality as an imperfect but most workable framework for an international bankruptcy regime.

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I. OVERVIEW OF CROSS-BORDER BANKRUPTCY: THE NEED, THE EXPECTATIONS, AND THE REALITY OF TRANSNATIONAL REGIMES

A. Why a Transnational Bankruptcy System?

Transnational bankruptcy regimes have been the subject of a lively debate in recent literature.[2] But the need for such a regime is not necessarily obvious; after all, every country that has economic activity of any global significance already has its own domestic bankruptcy laws.[3] These laws already purport to govern situations where the bankruptcy has an international dimension; that is, when the debtor's assets or creditors are located outside the borders of the country in which the bankruptcy occurs.[4] Why then is a global regime needed?

A global framework for bankruptcy law is necessary for largely the same reasons that domestic bankruptcy law is needed. In a world without bankruptcy law, considerable and unnecessary social costs would be imposed every time a troubled company is unable to pay its debts in full. In such a world, each creditor would have an incentive to be the first to file suit against the debtor, the first to reduce its claim to judgment, and the first to execute that judgment by seizing the debtor's assets. This race to the debtor's assets imposes two forms of social cost. First, the dismemberment of the debtor's estate may prevent the debtor's assets from being put to their highest value use. It is not uncommon that the debtor itself will already be the highest value user of the asset because the going-concern value of the debtor's business will frequently exceed the value of all the debtor's assets if sold piecemeal. Second, the "first-in-time" rule with respect to the creditors' ability to receive and execute a judgment is an inefficient way to ensure the optimal distribution of the debtor's assets.[5] Bankruptcy law solves both problems by (1) eliminating the forced liquidation of the debtor's assets (by giving the debtor the opportunity to reorganize, at least under certain circumstances); and, (2) when liquidation is indeed warranted, by imposing a system of priority on the competing claims that is deemed more socially optimal than a simple "first-in-time" rule.

Bankruptcy on a transnational level works in a similar way. Without a comprehensive international regime, a similar problem would occur. When a debtor encounters trouble, its creditors[6] would first look to the debtor's assets in their own country to satisfy their claims.[7] This course of action is rational because the creditors' cost of seizing the debtor's domestic[8] assets will be significantly

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2. *See* discussion *infra* Part II.

3. *See, e.g.*, 11 U.S.C. § 101-1532 (2008).

4. *See* 11 U.S.C. §§ 1501-1532 (2008).

5. *See, e.g.* Paulette J. Delk, *Payments by Check as Voidable Preferences: The Impact of Barnhill v. Johnson*, 45 ME. L. REV. 53, 56 (1993).

6. At least those who choose to declare a default, instead of pursuing an alternative resolution.

7. Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 7-9 (1997).

8. For the purposes of this discussion, I assume a multinational debtor and multiple single-nation creditors. Accordingly, for the purposes of this section, I use terms such as "foreign," "domestic," and "abroad" in reference to the country of the creditor, not the country of the debtor.

lower than their cost of pursuing assets abroad.[9] If domestic bankruptcy law operated without regard to an international regime, these creditors would then be able to force the debtor into bankruptcy in their own country (either by means of an involuntary petition or by a coercive placement into voluntary bankruptcy, such as by exercise of default and acceleration clauses) and then use the debtor's assets in that country to satisfy their claim. This is particularly true if the creditors believe that it is not worthwhile for them to participate in bankruptcy proceedings involving that debtor in foreign countries at all. Just as in the case of a domestic bankruptcy, creditors in various countries would then have an incentive to race to the assets in their home countries. This time, the incentive to rush to the assets is strengthened by the fact that the debtor's going-concern value (and its likelihood of repaying domestic debts) becomes increasingly threatened by foreign creditors' efforts to seize the debtor's assets elsewhere. This imposes the familiar social costs of unnecessary dismemberment of a going concern, which may already be putting its assets to their highest value use, and of poor ordering of distribution priorities among the competing creditors, this time on a worldwide scale.

An international bankruptcy regime would minimize those costs. It would provide a means for preserving the debtor's going concern value by instituting a mechanism that would authorize reorganization where it would maximize social benefit. It would also remove the incentives for creditors to rush to the debtor's assets in their own country by instituting a proceeding (or a set of concurrent proceedings) to authorize an orderly way for the debtor to reorganize or liquidate. It would finally provide for a distribution priority that maximizes social value, yet is mindful of disparate and, at times, mutually exclusive national policies that value certain kinds of creditors and claims over others.

B. Brief Overview of Bankruptcy Systems in Scholarship and Practice

Significant differences exist today between the substantive bankruptcy laws of various countries. Professor LoPucki[10] cites a wide array of differences in priority systems alone: for example, some countries allow tort creditors to share *pro rata* with contract creditors; others subordinate tort claims to contract claims; and still others do not allow any tort claims which have not yet been reduced to judgment. [11] Additionally, some countries treat creditors with setoff rights as secured (and therefore entitled to higher priority, at least in a reified sense), and others do not.[12] Also, some countries allow employees to assert high-priority claims for wages, others do not.[13]

9. Costs of pursuing assets abroad are numerous and may vary from case to case, but will usually include three similarities: the cost of unfamiliarity with the laws of the jurisdiction where the assets are located; the often-disfavored substantive status that such creditors may get as foreign creditors; and the increased cost of hiring foreign counsel, conducting foreign discovery, and collecting foreign assets.

10. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000).

11. *Id.* at 2224 (citing 11 U.S.C. §§ 502(b), 726(a) (2008)).

12. *Id.*

13. *Id.*

Beyond the differences in substantive bankruptcy laws, there are, more importantly, differences in the way that each country's bankruptcy regime approaches situations when some of the debtor's assets or debtors are located beyond its borders, and when a debtor that has assets within the country's borders seeks protection elsewhere. The differences between these regimes lie in two principal areas: the degree of cooperation that the country is willing to extend to another country when the debtor with assets in the first country has filed for bankruptcy in the second; and, the degree of access that the country allows to foreign creditors when a multinational debtor files domestically.[14] Five broad types of regimes of international bankruptcy are generally discussed in the literature today: territoriality, universality, contractualism, international organization, and secondary bankruptcy. Each is discussed in turn.

Under territoriality, each country in which the debtor's assets are located has jurisdiction over the distribution of only the portion of the estate that consists of the assets located in that country.[15] Accordingly, in a typical multinational bankruptcy, a multitude of concurrent proceedings in the various countries in which the debtor has assets is necessary for the resolution of the case.[16]

The second regime is universality. Under universality, only one country would have jurisdiction over the entire bankruptcy.[17] The courts of that country would apply that country's substantive bankruptcy law, such as rules governing automatic stay, avoiding powers, and distribution preferences.[18] All other countries in which the debtor has assets would then cooperate with the forum country, for example, by surrendering the control over the debtor's assets to the forum country.[19] In such a bankruptcy, there would only be one main proceeding, complemented as necessary by ancillary proceedings in countries in which the debtor owns assets.[20]

The third regime is that of corporate-charter contractualism, which is actually a form of universality. In that regime, each firm is free to choose the bankruptcy forum country and laws to which it wishes to be subject.[21] The choice would be made when the entity is incorporated.[22] The selection would be specified in the corporation's charter, which would in turn provide public notice of the corporation's choice.[23] Prospective creditors would thus receive information about the firm's bankruptcy options *ex ante*. Once made, the corporation's choice of

14. *See* M. Cameron Gilreath, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399, 403-04 (2000).

15. Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 701 (1999).

16. LoPucki, *supra* note 10, at 2219.

17. LoPucki, *supra* note 15, at 704.

18. *Id.* at 705; *see also* Gilreath, *supra* note 14, at 407.

19. LoPucki, *supra* note 15, at 705-06.

20. LoPucki, *supra* note 10, at 2220-21.

21. LoPucki, *supra* note 15, at 737.

22. *Id.* at 738.

23. *Id.* at 737-38.

bankruptcy regime cannot be revoked without overwhelming consensus of the creditors.[24] Proposals that advocate such systems sometimes exempt nonconsensual creditors from the debtor's *ex ante* forum choice.[25] The exemption exists to discourage firms from choosing countries with the most unfavorable tort liability laws for their bankruptcy regimes.[26]

Yet another proposal suggests that an international system be used for the adjudication of transnational bankruptcy cases.[27] Such a regime can be created by treaty.[28] The treaty can either provide for substantive law itself, or it can have choice-of-law provisions that would determine which country's substantive law applies to a given case. In such a system, a central adjudicative body – a world bankruptcy court – would apply the appropriate law and have jurisdiction over the debtor's assets everywhere.

The fifth proposal is the system of secondary bankruptcy, which is somewhat of a hybrid between territoriality and universality.[29] Under secondary bankruptcy, parallel proceedings would be instituted in each country in which the debtor has assets, in a manner similar to territoriality. The proceeding in the debtor's home country would be deemed to be the main proceeding, while all other proceedings would be secondary. Courts administering secondary proceedings would have the authority to distribute all of the debtor's estate in that court's country. However, each secondary court would be required to cooperate with the home country's court. In practice, that would mean that each secondary court would distribute only so much of the estate within its jurisdiction as is necessary for that court to preserve the law and public policy of its country. For example, if Country A's laws give priority to employees' back wages in bankruptcy, and Country B, which is the debtor's "home country," does not have such protections for employees, then Country A's court would distribute so much of the estate as necessary to satisfy the employees' claim, and transfer the rest to the home country. In other words, the secondary courts would only distribute the domestic portion of the estate to the minimum extent necessary to allow for the transfer of the case to the home country's court under the principles of comity.

The final proposal is cooperative territoriality, advanced primarily by Lynn LoPucki.[30] Cooperative territoriality is very similar to classic territoriality in that it provides for separate proceedings to occur in each country in which the debtor has assets. Unlike classic territoriality, however, it requires a greater degree of cooperation among the countries administering the proceeding. It is this system, with certain modifications, that I argue is the most workable of all approaches to cross-border insolvency systems.

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24. There is some disagreement in the literature whether the creditors' consent should be unanimous. Whether the system requires unanimity or supermajority, the outcome is largely the same for the comparative purposes of this paper.

25. LoPucki, *supra* note 15, at 737-41.

26. *See id.* at 739.

27. Gilreath, *supra* note 14, at 408.

28. *Id.* at 409.

29. LoPucki, *supra* note 15, at 732-33.

30. *See* LoPucki, *supra* note 15, at 742-59.

C. UNCITRAL Model Law and Existing Transnational Bankruptcy Law

In 1997, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the final draft of its Model Law on Cross-Border Insolvency.[31] In 2005, the UNCITRAL Model Law was enacted (or its model substantially followed) in the United States,[32] Canada, Australia, New Zealand, Eritrea, Mexico, Montenegro, and South Africa.[33] The UNCITRAL Model Law outlines several crucial mechanisms for international cooperation.[34] For example, it requires the adopting country to issue an automatic stay[35] once it recognizes a foreign proceeding.[36] It further empowers the adopting country's court to enjoin actions, transfers, and encumbrances of the debtor's property.[37]

The recent adoption of the UNCITRAL Model Law in the United States has resulted in a number of changes in the American approach to transnational bankruptcy. [38] Even prior to the law's passage, bankruptcy law in the United States was recognized as going "further than the law of any other industrialized nation in authorizing cooperation with foreign insolvency regimes."[39] But there were substantial limits.

Under prior law, when a debtor filed for bankruptcy protection in another country, it also had to file in the United States.[40] The filing was accomplished by the foreign estate's representative ("foreign representative") filing of a petition with the U.S. Bankruptcy Court.[41] That case was then deemed an "ancillary case."[42] The foreign representative could ask the U.S. Bankruptcy Court to enjoin any action or the enforcement of any judgment against the debtor, to turn over the

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31. U.N. Comm'n on Int'l Trade [UNCITRAL], *Model Law on Cross-Border Insolvency*, 5-20, U.N. Doc. A/52/649 (Nov. 25, 1997) [hereinafter UNCITRAL Model Law].

32. While this paper was being prepared, the UNICTRAL Model Law was formally enacted by the United States as part of a broader bankruptcy reform that largely focused on domestic matters of consumer bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1501, 119 Stat. 23, 135 (2005).

33. Sprecher, Grier & Halberstam, LLP, *Insolvency and Corporate Recovery: Articles*, http://www.sghlaw.com/insolvency/articles/cross-border-insolvency.html (last visited Apr. 22, 2008); United Nations Commission on International Trade Law, *Status: 1997 – Model Law on Cross-Border Insolvency*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

34. *See generally* UNCITRAL Model Law, *supra* note 31 (containing provisions for recognition of a foreign proceeding and relief in Chapter III and provisions for cooperation with foreign courts and foreign representatives in Chapter IV).

35. Similar to the automatic stay issued in U.S. bankruptcy cases pursuant to 11 U.S.C. § 362(a) (2008).

36. UNCITRAL Model Law, *supra* note 31, at art. 20(1). The desirability of an automatic stay actually represents a significant substantive policy judgment by the UNCITRAL because the automatic stay is required to be imposed upon recognition of a foreign proceeding even when the implementing country's domestic law does not provide for an automatic stay in its domestic bankruptcy cases.

37. *Id.* at art. 21(1)(c).

38. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801(a), 119 Stat. 23, 134 (2005).

39. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH U. L.Q. 931, 932 (1994).

40. 11 U.S.C. § 304(a) (repealed 2005).

41. *Id.*

42. *Id.*

debtor's U.S. property to the foreign representative, and to order any other appropriate relief.[43]

Despite the apparent latitude in the relief afforded to foreign representatives' petitions, there were significant practical obstacles to their success. American creditors were given plenty of grounds to oppose the foreign representatives' ancillary petitions under Section 304. In evaluating the creditors' opposition, courts were to be guided by a list of factors that include, *inter alia*, "protection of *claim holders in the United States* against prejudice and inconvenience" and "distribution of proceeds... substantially in accordance with the order prescribed by" American law.[44] These protections were squarely aimed at protecting U.S. creditors who (1) likely preferred the American forum, (2) have extended credit in reliance, in part, on the distribution of assets in accordance with American bankruptcy law, and (3) were also "claim holders in the United States" whose interests were required to be considered by statute.[45]

Under prior law, American courts have used two conflicting approaches in evaluating domestic creditors' opposition to §304 petitions by foreign representatives. The first emphasized comity over all other factors presented in §304(c), or, alternatively, weighed all of the §304(c) factors *in light of* comity. Such courts would generally deny the foreign representatives' §304 petitions only if allowing the foreign court to handle the debtor's U.S. assets would have violated "the law and public policy of the forum state [the United States]...."[46] Denials of the foreign representatives' §304 petitions were rare under this approach.

The other approach was to simply weigh comity *alongside* the other §304(c) factors. Bebchuk and Guzmán cite *In re Papeleras Reunidas* as an example of a case in which this approach was applied.[47] Predictably, it resulted in the denial of the foreign representative's §304 petition.[48] Considerations of comity were likewise jettisoned in favor of concerns than an American creditor might be treated as an unsecured creditor, rather than a lien creditor under Canadian law, despite the absence of finding that Canadian law in any way violated American public policy in *In re Toga*.[49] Bebchuk and Guzmán further argue that extra-statutory considerations likewise guided some American courts away from the universalist approach embraced by §304. They cite favoritism by the courts as an important concern, and specifically cite *In re Lineas Areas de Nicaragua* as a particularly

43. 11 U.S.C. § 304(b) (repealed 2005).

44. *Id.* at § 304(c) (emphasis added) (listing other factors such as just treatment of all holders of claims, prevention of preferential or fraudulent dispositions of property, comity, and provision of a fresh start); *see also* Lucian Arye Bebchuk & Andrew T. Guzmán, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 783 (1999).

45. Bebchuk & Guzmán, *supra* note 44, at 783.

46. In re Culmer, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982).

47. Bebchuk & Guzmán, *supra* note 44 at 784; *see also* In re Papeleras Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988).

48. *In re Papeleras*, 92 B.R. at 594-95.

49. In re Toga Mfg. Ltd., 28 B.R. 165, 170-71 (Bankr. E.D. Mich. 1983); *see also* Bebchuk & Guzmán, *supra* note 44, at 785.

egregious example of such favoritism.[50] In *Lineas*, the court turned the assets over to the Nicaraguan bankruptcy court only on the condition that all claims of U.S. creditors were satisfied first.[51] A milder example of such favoritism is the expansive reading of the "prejudice to U.S. claim holders" factor of the §304 analysis by the Second Circuit in *In re Cunard*.[52] Regardless of whether one considers *Lineas* and *Cunard* as examples of extra-statutory favoritism, as Bebchuk and Guzmán do, these cases clearly do not consider comity to be the trumping factor in §304. This interpretation largely knocked the wind out of §304's universalist sails in that it allowed cooperation with a foreign court only if American claim holders' interests were not impaired. Because, by definition, no self-interested creditor would oppose a §304 petition unless the opposition is in its interest, the consequence of this view was essentially that the court's role should be limited to rubber-stamping the creditor's choice of law.

It should be noted that even under prior law, the United States was generally considered among the countries to afford the highest degree of solicitude to foreign bankruptcy regimes even in the absence of a specific bilateral treaty.[53] Bebchuk and Guzmán cite the examples of Great Britain and Japan to illustrate the point.[54] In Great Britain, cooperation with most foreign regimes (other than those designated by executive order) is on an *ad hoc* basis—to the extent such cooperation occurs at all.[55] In Japan, until the turn of the twenty-first century, such cooperation was essentially forbidden altogether. Japanese law expressly exempted a debtor's Japanese assets from the operation of foreign bankruptcy adjudications, and limited the effects of domestic bankruptcy adjudications only to Japanese property.[56] Current Japanese law is based in part on the UNCITRAL Model Law,[57] but its approach is still decidedly more territorial.[58] While it now

50. Bebchuk & Guzmán, *supra* note 44, at 783; *see also* In re Lineas Areas de Nicaragua, 10 B.R. 790 (Bankr. S.D. Fla. 1981).

51. *In re Lineas*, 10 B.R. at 791.

52. Cunard S.S. Co. v. Salen Reefer Serv. AB, 773 F. 2d 452, 459 (2d Cir. 1985).

53. Bebchuk & Guzmán, *supra* note 44, at 781.

54. *Id.* at 786-87.

55. *Id.* at 786.

56. *Id.* (citing Shoichi Tagashira, *Intraterritorial Effects of Foreign Insolvency Proceedings: An Analysis of "Ancillary" Proceedings in the United States and Japan*, 29 TEX. INT'L L.J. 1, 7 (1994));*see also* Kazuhiko Yamamoto, *New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law*, *available at* http://www.iiiglobal.org/country/japan/legislation.pdf.

57. *Id.*

58. Yamamoto argues that the difference between the new Japanese bankruptcy law and the UNCITRAL Model Law is largely rooted in the fact that the UNCITRAL Model Law operates on the common-law model and gives judges a significant amount of discretion, and that Japan's modification of the law was largely limited to the extent of adopting it for the civil law model. But in reality, Japanese law makes substantive departures from the UNCITRAL Model Law that have nothing to do with the civil-versus-common law issue. For example, Japan imposes far more onerous requirements on the recognition of foreign proceedings, which include that no prejudice to local creditors must occur. Additionally, the foreign proceeding must correspond to one of the five types of bankruptcy proceedings allowed under Japanese law for recognition. *Id.* These differences are probably less likely to be due to Japan's desire to limit the discretion of judges in its civil-law tradition (indeed, Japanese judges appear to have more discretion at the recognition stage than their American counterparts) than to

allows for some recognition of foreign bankruptcy proceedings, it imposes conditions that are similar to the old United States approach under the *Papeleras* line of cases.

The changes instituted by America's adoption of the UNCITRAL Model Law were profound. The old Section 304 of the Bankruptcy Code was eliminated entirely.[59] Its provisions on foreign representatives' access to U.S. Courts were replaced with the far more expansive provisions of the UNCITRAL Model Law.[60] First, the requirement of comity as an overriding consideration, one in light of which all other factors must be considered, was incorporated into the text of the statute.[61] The requirement applies not only to the decision about whether to accept the foreign representative's petition at all,[62] but also to its treatment of the petition once it is accepted, and to the treatment of the foreign representative in other U.S. proceedings that may be pending before different, non-bankruptcy courts.[63] The new statute also expressly requires that courts consider its international origin and the need to promote its application in a manner consistent with that of other adopting countries.[64] The sole hurdle for the foreign representative is obtaining recognition, and the burden imposed thereby is far from onerous. The requirements are limited to the following: there must exist a foreign main proceeding, the foreign representative is a person or body, and the petition is accompanied with some form of official verification of the existence of the proceeding and of the foreign representative's authority.[65] The statute still retains the option for the United States Courts to refuse a case if it would be "manifestly contrary to the public policy of the United States,"[66] but the grounds for the refusal are written much more narrowly than previous case law allowed.

In sum, the statute places the United States farther along the path toward universality. It eliminates any ambiguity that was caused by the conflicting interpretations of the old Section 304 in the *Culmer* and *Papeleras* lines of cases. It drastically lowers the barriers to the acceptance of foreign representatives' petitions in United States courts. Finally, the adoption of the UNCITRAL Model Law places a renewed emphasis on comity that is accorded to foreign bankruptcy proceedings.

D. Requirements for a Desirable Transnational Bankruptcy Regime

A successful transnational bankruptcy regime must meet two primary (and occasionally competing) criteria. First, the regime must be efficient. That is, the regime must minimize the costs it imposes on the debtors, creditors, sovereigns, and society. Second, the regime must be attractive for adoption by a significant

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Japan's substantive preference for territoriality.

59. Act of Nov. 6, 1978, Title I, § 101, 92 Stat. 2560, *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title VIII, § 802(d)(3), 119 Stat. 146 (2005).

60. *See* 11 U.S.C. §§ 1509-1514.

61. *Id.* at § 1507.

62. *Id.*

63. *Id.* at § 1509(b)(3).

64. *Id.* at § 1508.

65. *Id.* at §§ 1515(b), 1516(a).

66. *Id.* at § 1506.

number of sovereigns. In other words, the widespread acceptance of the bankruptcy regime – like almost any other regime – is a prerequisite for its success in becoming a true international economic regime. I address each criterion in turn, setting forth some of the features that a bankruptcy regime should have to succeed on those criteria.

Efficiency requires that the bankruptcy process be achieved with the lowest possible cost imposed on all parties.[67] The parties involved include the debtors themselves,[68] ordinary creditors,[69] special-situation creditors,[70] and the public[71]. A number of factors may contribute to the minimization of costs on these actors. I discuss three such factors here: (1) the degree to which the bankruptcy system ensures that the parties can predict the set of substantive rules to which they will be subject in the event of a bankruptcy; (2) the elimination of duplicative efforts by courts of multiple countries if concurrent proceedings are present; and (3) the provision of *ex ante* incentives for the optimal allocation of capital.

The first factor is the predictability of the system. By predictability I mean the ability to determine the exact nature of bankruptcy rules (and the nature of the forum) that will govern a particular debtors' bankruptcy in advance of such bankruptcy. The more predictable a system is, the more likely that prospective

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67. Different countries, of course, may provide different protections to the same type of person who suffers the same cost. For example, an American employee's claim for wages may be partially protected by offering the employee a high priority in the distribution process. The same claim for wages, if made by a Mexican employee in a Mexican bankruptcy proceeding, receives a lower priority, but is not subject to a limitation on its amount as it is in the United States, even though the costs imposed on the two employees is identical. The efficiency criterion is not concerned with such differences in public policy among those countries. I do not treat these public valuations of the employee's claim as true differences in the costs suffered by the two respective parties. I instead address this issue when I discuss the importance of allowing sovereigns to participate in the process to the extent necessary to protect their own domestic public policy. I assume throughout this paper that the value judgments inherent in the sovereigns' public policies accurately reflect the public preferences of the society represented by that sovereign. To the extent that this is not always true – for example, in case of dictatorships or regimes that disenfranchise particular classes of constituents – the difference between public policy and that society's value preferences will distort the efficiency of the application of the bankruptcy regime, and impose nontrivial costs that this paper acknowledges but does not include in the scope of its discussion.

68. Including the debtors' equity holders.

69. Including both secured and unsecured contract creditors. I treat contract creditors as a distinct class of interests because such creditors ostensibly had the opportunity to bargain for credit terms. This class also includes domestic sovereign creditors (e.g. taxing entities) because, although they did not have an opportunity to bargain directly with the debtor, they are in a unique position to make rules that govern the terms of the debtor's obligation to them and are therefore on par with (or even better off than) contract creditors in this respect.

70. Creditors who did not have an adequate opportunity to bargain for their terms of credit. The class includes not only tort victims (who are the quintessential non-consenting creditors), but also employees (as contract creditors whose bargaining power in comparison with the debtor is very weak).

71. Including the victims of any negative externalities created by the bankruptcy process. I use the term "public" to also include the sovereigns themselves in their non-creditor capacity. In particular, sovereigns' concern about the consumption of their resources – such as judicial resources or other resources expended in the course of bankruptcy adjudication – must be given weight in any efficiency determination.

creditors will be able to accurately assess their risk. In other words, prospective creditors' *ex ante* knowledge of the exact set of rules that will govern their prospective debtor's insolvency will help such creditors to assess their exposure and will accordingly help them price credit more accurately. Conversely, *ex ante* predictability will also allow the debtor to insist on lower interest rates in some circumstances. In sum, *ex ante* information about bankruptcy rules will lead to a more efficient determination of the price of credit. The main beneficiaries of a predictable system are ordinary creditors (who can then compete effectively against other creditors by pricing credit accurately) and debtors (who can enjoy interest rates that are not artificially inflated by the lenders' risk-averseness in an unpredictable system). It is important to note that, for the purposes of predictability, it is not critical to decide the precise substantive rules of the bankruptcy system. Efficiency gains from a predictable system are realized when the rules, whatever they are, are known in advance.

The second consideration useful to the determination of efficiency concerns the elimination of duplication of effort in the proceeding itself. To the extent that multiple sovereigns' courts will be simultaneously involved in the proceeding, the system must ensure, as much as possible, that duplication of effort among those courts does not occur. This consideration is important for two reasons. First, judicial resources will be wasted if multiple courts are called upon to review the same issue, claim, or argument. Second, duplication of effort among different courts will increase the likelihood of inconsistent findings of law and fact by those courts. That can leave parties in the unenviable situation where compliance with one court's order may mean the disobedience of the other, and thus also greatly compromise *ex ante* predictability of the system.

The last consideration concerns incentives for the optimal *ex ante* allocation of capital. Inefficiencies can result in a number of ways, not the least important of which is described by Bebchuk and Guzmán.[72] In a system where disparate treatment of creditors in different countries in bankruptcy will cause those creditors to price credit differently, the debtor will, *ceteris paribus*, be inclined to borrow in a more creditor-friendly country[73] because creditors from that country will be able to offer lower interest rates. To the extent that the debtor is more likely to invest in the same country as the one in which it borrows (which it may want to do for a number of reasons unrelated to bankruptcy considerations),[74] this low interest rate may cause the debtor to invest in a country that offers a lower rate of return on the investment than is otherwise available. At first blush, the system appears unproblematic: if the debtor can obtain credit at a lower cost, and if this

72. *See generally* Bebchuk & Guzmán, *supra* note 44 (examining how territoriality generates distortions in investment patterns that can lead to inefficient allocation of capital).

73. The country may be more creditor-friendly; alternatively, it may be friendly to domestic creditors and hostile to foreign creditors. The model holds true for any bankruptcy system which enables one country's creditors to offer better interest rates than others based solely on the fact that such creditors would be in a better predicament in a bankruptcy proceeding.

74. Among such reasons are the costs of compliance with various regulations concerning foreign investment, currency conversion, currency market fluctuations, cost of doing business over a long distance, and others.

reduction in cost provides the debtor with the best possible overall investment opportunity, then Adam Smith's invisible hand has done its job. That, however, is not the case, for this low cost comes at a price. If the creditor that offers credit at low cost obtains priority in the distribution of the debtor's asset in bankruptcy, all proceeds of the estate come at the expense of other claimants who are not entitled to the same priority. The distribution of the estate is effectively a zero-sum game: whatever the favored creditor wins, at least one other claimant must lose. The resultant cost, therefore, is borne largely by the non-privileged claimants (who lose out on the debtor's assets in the distribution of the estate) and by the debtor itself (who, in reliance on the low interest rate, decided to forego other investment opportunities that may have offered a higher return).

II. THE REGIME OF TERRITORIALITY

A. Overview

The regime of territoriality is the prevailing set of rules under which transnational bankruptcies are resolved today.[75] The basic rule of territoriality states that the courts of each state in which the debtor has assets are responsible for distributing those assets – and only those assets – that are located within the territory of that state.[76] For example, if a computer manufacturer has a research laboratory in the United States, an assembly plant in Taiwan, and customer support operations in India, the law and courts of the United States would oversee the distribution of the laboratory assets, the law and courts of Taiwan would handle the assembly plant, and Indian law and courts would be responsible for the customer support assets. Each of these courts would apply the domestic law of the country in which it is sitting.[77] Each court would also handle claims from all of the debtor's creditors, wherever such creditors may be located, and regardless of the status of such creditors as consenting creditors (contract creditors) or non-consenting creditors (tort victims and governments).

Under a regime of territoriality, various incentives drive each country's decisions about the structuring of its own domestic bankruptcy laws. The most obvious of these incentives is to adopt laws that favor domestic creditors and disfavor foreign creditors.[78] The benefits of such laws (such as encouragement of domestic economic activity and the attendant political gains for the domestic government) and their costs (such as creating inefficiencies in *ex ante* resource allocation) will be explored more fully *infra*.

Territoriality has sometimes been derogatorily referred to as "the grab rule" because each country has the incentive to, roughly speaking, use its laws to "grab" the debtor's domestic assets for the benefit of its domestic creditors, particularly if

75. Despite the adoption of the UNCITRAL Model Law by the United States and a few others, these countries are still in the small minority. The erosion of territoriality as the dominant regime has been minor at best. *See, e.g.* Bebchuk & Guzmán, *supra* note 44, at 787.

76. LoPucki, *supra* note 10, at 2218.

77. Including, of course, the choice-of-law rules of the forum jurisdiction. The application of those rules may naturally result in the application of substantive law that is different from the substantive law of the forum state.

78. Bebchuk & Guzmán, *supra* note 44, at 780.

the debtor is foreign.[79] But in practice, that rule has been altered to varying degrees by provisions in national bankruptcy laws that authorize cooperation with foreign bankruptcy regimes. For example, substantive American bankruptcy law takes a somewhat universalist approach in that it regards the debtor's estate, when created by a U.S. filing, to include assets abroad,[80] and exhibits a degree of deference to foreign proceedings.[81] Even before the adoption of the UNCITRAL Model Law, the Bankruptcy Code, for example, authorized a foreign representative to file an ancillary proceeding with the U.S. Bankruptcy Court that would enjoin any American action against any of the debtor's property if such property is involved in the foreign proceeding.[82] It also authorized the court to turn over such property to the foreign representative.[83] The adoption of the UNCITRAL Model Law has expanded this cooperation even farther.

It should be noted, however, that few, if any, regimes of pure territoriality exist today. Most domestic regimes blend at least a few non-territorialist elements into their framework for transnational bankruptcy resolution.[84] But despite these nascent elements of universality, territoriality remains the dominant force in transnational bankruptcy today.[85] Prior to the adoption of the UNCITRAL Model Law, the apparent strides toward universality made by the United States were tempered by the courts' solicitousness to the interests of American creditors at the expense of comity. It is yet to be seen how the adoption of the UNCITRAL Model Law will affect the situation. The regime of territoriality has significant advantages and disadvantages, some of which I explore below.

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79. *Id.* at 777-78.

80. 11 U.S.C. § 541(a) (2007) (defining estate to includes assets "wherever located and by whomever held"); Bebchuk & Guzmán, *supra* note 44, at 781-82 (recognizing that "wherever located" language generally understood to encompass assets abroad). A well-publicized recent example of this view surfaced in the case of Yukos Oil Company ("Yukos"), an energy firm in the Russian Federation. The Russian government, apparently in retaliation for the support of public criticism of President Putin by Yukos' CEO, claimed that Yukos was liable to the Russian for $27 billion in back taxes and penalties. The validity of that tax bill remains disputed. Yukos, predictably, was unable to come up with the money, whereupon the Russian government sought to seize and sell Yuganskneftegaz ("YNG"), Yukos' most valuable production asset, at a public auction. YNG is a production facility located in Yugansk, Russia. At that time, Yukos filed for Chapter 11 in the Southern District of Texas, seeking to use the automatic stay to enjoin the auction. While the bankruptcy court was unable to order the Russian government not to conduct the auction, its temporary restraining order successfully prevented various investment banks from participating in the deal. Yukos' U.S. filing therefore resulted in a U.S. injunction that applied to purely foreign assets. Yukos was ultimately unsuccessful in preventing the sale of YNG (which was ultimately purchased by a state-run Russian oil firm, Rosneft, using alternate financing and a shadowy intermediary), and its Chapter 11 petition was subsequently dismissed. But the case is nonetheless remarkable in that Yukos, a Russian company with almost no U.S. contacts, was able to obtain an injunction from an American court that applied to its purely Russian assets. In re Yukos Oil Co., 320 B.R. 130 (Bankr. S.D. Tex. 2004).

81. *See* Bebchuk & Guzmán *supra* note 44, at 782.

82. 11 U.S.C. § 304(b)(1) (repealed 2005).

83. *Id.* at § 304(b)(2).

84. Gilreath, *supra* note 14, at 405.

85. Bebchuk & Guzmán, *supra* note 44, at 787.

B. Advantages of Territoriality

Territoriality offers three distinct advantages as a regime of international bankruptcy. First, it is significantly more predictable and flexible than the other regimes discussed in this paper. Second, despite the multiplicity of proceedings in multiple countries that are necessary in a regime of territoriality, the costs of such proceedings are contained because each country's court is dealing only with domestic assets and applying domestic laws. Third, it allows local creditors to litigate in a closer and more convenient forum than they would be able to under a regime of universality. I explore each advantage in turn.

First, territoriality offers the most predictable and flexible regime of all. Territoriality is predictable because the identity of the court that will decide the disposition of a particular asset, and the law that the court will apply in its decision, are both determined from knowing a single piece of information: the location of that particular asset. That information is ascertainable at a fairly low cost, particularly for real and tangible personal property.

There also exists international agreement on standards for determining the location of intangible property, such as bank accounts, franchises, and leases.[86] Accordingly, whenever a creditor relies on the debtor's assets in extending credit, the location of those assets will, *ex ante*, enable the creditor to know the bankruptcy regime with which the creditor would need to contend. A universalist regime, on the other hand, would not offer such certainty, for both the reviewing court and the applicable law would be determined in accordance with criteria which are hard to evaluate *ex ante*. Under one view of universality, the debtor would have wide latitude of countries in which it could file. In other words, if the debtor were to desire to avail itself of the automatic stay requirement of a particular country, it would file in that country, whose bankruptcy regime would then govern the entire proceeding. Such arrangement makes it impossible to predict either the forum of the substantive law that will govern the bankruptcy.

Under a more common view of universality, the debtor would file in its "home" country. That poses a number of problems of its own, not least of those being that many multinational companies are formally separated into discrete entities, each in a different "home country." In such a bankruptcy, the debtor, having many "home countries" thanks to the geographic diversity of the debtor's entities, would have the ability to file wherever it chose. From the standpoint of predictability, such a regime is untenable. Alternatively, each of the debtor's entities could file in its own "home country." This view of universality still does not confer any advantages over territoriality. If these proceedings were to become consolidated into one at some point after filing, the determination of the country of forum and of applicable law is often far from clear. If the individual proceedings were to remain in their own countries, the resulting arrangement would be little different from territoriality, except that the jurisdictional lines would run along the boundaries of national entities rather than purely along the location of assets.

Yet another regime – corporate-charter contractualism, similar to that

86. LoPucki, *supra* note 15, at 743-44.

advocated by Robert Rasmussen[87] – purports to kill two birds with one stone. Corporate-charter contractualism appears predictable at the outset; after all, the applicable bankruptcy regime is stated right in the corporation's charter. But its application is more difficult in practice. While large creditors with experience in multinational lending are likely to have both the knowledge and the experience necessary to lend under regimes different from their own, the same may not be true for smaller creditors, particularly if the debtor's bankruptcy regime choice is not a commonly encountered one. While the identity of the overall regime to be applied to the case is abundantly clear, the subjective intrinsic predictability of that regime (arising from the fact that the rules of the regime are likely unknown and practically unknowable to smaller creditors) leaves much to be desired. Such uncertainty will raise these smaller creditors' cost and reduce competition among creditors, resulting in a less efficient outcome.[88] The other claimed advantage of corporate-charter contractualism is that of flexibility, in that the parties are free to choose their own bankruptcy regime. This freedom would result in the optimal regime for the parties, not only because they would choose the regime that is best for them, but also because bankruptcy regimes would become a commodity and individual countries would compete with each other to deliver the best one. But in practice, this is highly unlikely to work to the advantage of anyone but the debtor and the largest creditors. Smaller creditors are again left at a disadvantage. This is necessarily so because most large international firms have only a few major creditors (with whom they can negotiate fairly easily about their regime choice) but a myriad of smaller ones (whose numerosity raises transaction costs for negotiations with them to the point of impossibility). Thus, from the standpoint of smaller creditors, such a system would be neither predictable nor flexible. Accordingly, territoriality affords both predictability and flexibility, and does so better than universality.

The second advantage conferred by territoriality is that individual domestic proceedings do not tend to be overly costly in comparison to a large, consolidated international case. First, each court is concerned only with applying its own domestic law, and need not make time-consuming and labor-intensive inquiries into the laws of other countries. Second, each court is concerned only with assets and claims that arose in their domestic jurisdiction, greatly reducing the number of parties, adversary proceedings, and evidentiary hearings that are needed to resolve the parties' rights. Even compared to a single multinational consolidated proceeding, the duplication of efforts – which, to some degree, is inevitable whenever multiple proceedings exist – is not likely to impose significant additional costs, at least to the extent that most of the hearings about individual claims and assets would not be duplicated because each would occur in its home country.

The third advantage of territoriality is that it affords all creditors a local forum. Unless the creditor's claim exceeds what the creditor would receive under domestic law, the creditor never needs to assert its claim in a foreign country. Some creditors' claims can likely be satisfied in full – or close to full – solely with

87. Rasmussen, *supra* note 7, at 32-35.

88. LoPucki, *supra* note 15, at 739.

the domestic assets of the creditor. The remaining creditors will be fewer in number and will incur a lower total cost in asserting their claims in foreign countries. It is worth noting that both private and public costs would be spared in such case. Private costs savings come from creditors who no longer need to assert their claims in a foreign country. Public savings occur from judicial resources, which are saved when individual courts have to conduct fewer evidentiary hearings, deal with fewer parties, and can avoid the labor-intensive task of analyzing foreign law.

C. Disadvantages of Territoriality

A transnational bankruptcy regime based on territoriality exhibits three principal weaknesses. First, it results in waste caused by duplicative efforts across multiple jurisdictions. Second, it encourages strategic *ex ante* behavior by debtors and creditors that creates significant negative externalities, and is therefore inefficient. Third, even in the absence of strategic behavior, territoriality still provides wrong *ex ante* incentives for capital allocation, resulting in the debtors' assets not being put to their highest value use. Each of these weaknesses is discussed in turn.

The first weakness of territoriality is also its most obvious one: when proceedings are launched in multiple jurisdictions simultaneously, each jurisdiction – though responsible only for assets within its reach – will inevitably be required to make findings that are duplicative of those made by other jurisdictions in the parallel proceedings. For example, whenever a creditor asserts a claim in more than one country, the existence of the claim – even if based on the same transaction or occurrence – may have to be separately determined under the laws of each country. Parallel proceedings in multiple countries are likely to result in another and more powerful flaw in the final resolution: if each country allocates only the domestic assets of the debtor, it will often be forced to split those assets from the debtor's foreign assets. This can result in piecemeal liquidation of assets that ought to be treated as integral. This piecemeal treatment will frequently significantly lower the liquidation value of the debtor's assets.

The second disadvantage of the system of territoriality is that it creates opportunities for strategic behavior by debtors and creditors. Here, debtors and creditors have an *ex ante* incentive to choose the location of the debtor's assets to secure the most favorable treatment to themselves. Thus, in a purely territorial regime (such as the regime that existed in Japan until the turn of this century), if Country X is friendly to tort creditors and Country Y is not, the debtor (and any large unsecured lender of the debtor, which may ordinarily be forced to share in the proceeds of the debtor's estate with the tort victims) will have an incentive to ensure that the debtor's assets will be located in Country Y and not in Country X. Such behavior is inefficient because Country Y may not provide the debtor with the best return on its assets, and because tort victims in Country X will go undercompensated for their cost. Moreover, the disparity among various countries' systems, in the absence of cooperation between those countries, provides opportunities for strategic behavior that is even more harmful. On the eve of bankruptcy, the debtor (alone or in collusion with one or more creditors) may move assets to a jurisdiction that would benefit them the most. Assets are thus

moved beyond the reach of the domestic creditors, who are left to choose between taking a reduced share of the debtor's estate or braving the waters of a foreign proceeding.

The final disadvantage is explored fully in the Bebchuk and Guzmán model.[89] In essence, territorialist systems will create an inefficient market interest-rate distortion when they are present in the world economy alongside universalist regimes. This occurs because territorialist systems tend to favor domestic creditors over foreign ones. Such preference may occur either explicitly or implicitly. An example of an explicit preference would be the one present in the United States before the adoption of the UNCITRAL Model Law, such as one expressed in *Lineas Areas de Nicaragua*, where the court insisted that the claims of American creditors must be satisfied in full before the claims of all other creditors would be satisfied at all.[90] Implicit preferences are generally not as egregious, but the costs that they impose are equally real. These preferences include both the substantive limitations on the rights afforded to the foreign representatives in the countries' domestic law, and the simple fact that it is generally much costlier for foreign creditors to pursue their claims. Regardless of the cause and manner of preference of domestic creditors over foreign, the outcome is the same: *ceteris paribus*, domestic creditors stand a higher chance of being paid on their debt than foreign creditors in a bankruptcy proceeding in a territorialist system. The distortion occurs because universalist systems do not have the same preference for domestic creditors; indeed, universalist systems will hang their domestic creditors out to dry[91] when a foreign bankruptcy proceeding is initiated. As a result, domestic creditors in territorialist systems are more likely to be paid back than domestic creditors in universalist systems. Domestic creditors in territorialist systems are consequently more likely to be able to offer lower interest rates because of their lower risk exposure. Debtors will thus be more likely to borrow in territorialist systems over universalist systems. Creditors in territorialist regimes will look to the debtor's assets to satisfy their claim, generally through some combination of an express grant of a security interest, the setting of various default triggers in the loan agreement that relate to the state of the debtor's assets, some prohibition on the movement of the debtor's assets abroad, or some other mechanism of expressing the creditor's reliance on those assets. The debtor will accordingly be limited (at least to some degree) to keeping its assets and investments in the territorialist country. This is inefficient because the debtor's assets may be able to be put to better use abroad. There is another inefficiency which Bebchuk and Guzmán overlook: over time, the territorialist country will become oversaturated with investment capital, which will eventually further decrease the return on that investment capital, and which will further increase the opportunity cost to the

89. *See* Bebchuk & Guzmán, *supra* note 44, at 794-98.

90. *In re Lineas*, 10 B.R. at 791.

91. Relatively, of course. This paper acknowledges that even universalist systems generally have a public-policy exception to their deference to foreign bankruptcy proceedings. But the contrast with territorialist systems is illustrative, in that territorialist systems will actively protect their domestic creditors, whether explicitly or implicitly, while universalist systems will generally assume a hands-off approach, unless an issue of public policy is involved.

debtor of not investing in a universalist country. It must be noted that the disparity in the debtor's cost of capital between the territorialist and universalist regimes cannot be attributed to territoriality winning the "competition" for investment capital between the two types of regimes. Rather, the surplus enjoyed by debtors and creditors in the territorial regime is actually a negative externality that comes directly from the pockets of universalist-regime creditors who do not have a way of recouping their investment when a territorial-regime debtor files for bankruptcy.

III. THE REGIME OF UNIVERSALITY

A. Overview

Until the recent times, universality remained a regime that was largely the ideal advanced by academics,[92] but unimplemented by policymakers. Even some proponents of non-universalist systems see universality as an overarching goal, with their proposed systems being merely an interim solution.[93] The recent times have seen varying forms of strides toward universality, with the adoption of the UNCITRAL Model Law by some countries, with the passage of UNCITRAL-influenced universalist laws in others,[94] and with varying degrees of built-in universality, unrelated to the UNCITRAL Model Law, in the domestic regimes of still others. With these exceptions, universality still remains largely a theoretical rather than practically-implemented system.

The central premise of universality is deceptively simple. Under universality, one country – say, the debtor's "home country" – would be responsible for administering the debtor's bankruptcy.[95] The home country would exercise control over the debtor's assets located both within and outside its borders.[96] To the extent that the home country would be unable to directly reach the debtor's foreign assets under the traditional principles of jurisdiction, the courts of the countries where such foreign assets are located would turn those assets over to the home country's court to enable it to administer the bankruptcy on a global level.[97] There would be a single proceeding, and all creditors, wherever located, would be required to assert their claims in that proceeding.[98] The judgment of the home country's court would have worldwide effect, and any assets previously located beyond the home country's reach would be rendered under its control by the foreign courts' cooperation.[99] Each home country would apply its own substantive law to the adjudication of the bankruptcy, with the possible exception, under some proposals, of establishing the parties' pre-bankruptcy rights.[100] No proceedings would occur in countries other than the home country, except to the extent

92. Rasmussen, *supra* note 7, at 17.
93. LoPucki, *supra* note 10, at 2217.
94. *See also* Bebchuk & Guzmán, *supra* note 44, at 786-87.
95. Bebchuk & Guzmán, *supra* note 44, at 778.
96. LoPucki, *supra* note 10, at 2216.
97. Bebchuk & Guzmán, *supra* note 44, at 782.
98. Gilreath, *supra* note 14, at 407.
99. LoPucki, *supra* note 10, at 2221.
100. Gilreath, *supra* note 14, at 407-08.

necessary to establish the cooperation of those countries with the home country.[101]

This idyllic proposal is recognized, even by its proponents, as unworkable in the current world circumstances and incompatible with the notion of sovereignty.[102] Desire to protect sovereignty leads countries – even those with universalist leanings – to adopt limits on their cooperation with foreign proceedings, much like the United States did before the adoption of the UNCITRAL Model Law, and continues to do today.

Other flavors of universality have been proposed, notably by Professor Westbrook. Westbrook's proposals[103] include (1) both those based on a single body of international substantive bankruptcy law[104] and those based on national laws;[105] (2) both those applied by a single new international bankruptcy court[106] and those administered by an existing national court;[107] and (3) both those universally applicable to all creditors and those which would apply universality to large, sophisticated creditors and non-universalist rules to small, unsophisticated creditors.[108] For all their variance in the choice of substantive law and the choice of forum, "pure" universalist proposals have one common defining trait: a single court administers the bankruptcy, and all other courts participate only to the extent necessary to empower the "lead" court to complete its task, or to the extent necessary to protect their own vital national interests in a manner consistent with comity.

B. Advantages of Universality

Advantages of universality are plentiful and oft-cited. First, a single forum for resolving all disputes relating to the bankruptcy is cost-effective. Second, the outcome of the bankruptcy proceeding would not be influenced by something as fortuitous (or as manipulable) as the placement of the debtor's assets on the eve of the bankruptcy. Third, there would be no opportunity for forum-shopping because each debtor would file in its home country, a fact that would be known to all potential creditors in advance and would thus promote consistency and predictability.

Universality is cost-effective for three independent reasons. First, having a single court and a single trustee manage all of the debtor's assets will eliminate the transaction costs that would otherwise be incurred by having multiple courts and multiple representatives.[109] Second, the coordinated management of the debtor's estate will prevent the debtor's piecemeal liquidation, preserve its going-concern value, and maximize the distributions to all creditors in the event of liquidation.[110]

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101. LoPucki, *supra* note 15, at 699.

102. LoPucki, *supra* note 15, at 734; LoPucki, *supra* note 10, at 2220-21.

103. LoPucki, *supra* note 10, at 2221-23.

104. *Id.* at 2221.

105. *Id.*

106. *See id.*

107. *Id.* at 2221-22.

108. *Id.* at 2222 (citing Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 579 (1993)).

109. LoPucki, *supra* note 15, at 707-08.

110. *Id.* at 706-07.

Third, universality results in an efficient choice between liquidation and reorganization. Without universality, creditors in countries with high asset-to-claim ratios would not have an incentive to push for reorganization, while creditors in countries with low asset-to-claim ratios would have an incentive to encourage those risks.[111] The combination of a single point of estate management, preservation of the debtor's going-concern value (when efficient), and efficient choice of liquidation versus reorganization thus contributes to the cost savings of universality over other regimes.

The outcome of a bankruptcy proceeding under universality, moreover, would not be affected by the particular placement of the debtor's assets. While the location of an asset provides an easy and predictable way to ascertain the nature of the bankruptcy regime that will govern its liquidation, that location itself is both fortuitous and easily manipulable. That is particularly true for intangible assets that can be easily moved across national borders, such as bank accounts.[112] Under universality, the location of the asset would not matter, as its distribution would in any case be governed by the law of the "home country."

Finally, universality also discourages other kinds of strategic behavior, such as forum-shopping by debtors. This advantage is most pronounced when there exists a mix of universalist and territorialist regimes around the world, and the debtor seeks to file in a universalist regime that is different from its home country. The recent bankruptcy of the Yukos Oil Company, where the Russian corporate debtor forum-shopped itself into a Texas bankruptcy court (which, by statute, had jurisdiction over all of Yukos' assets "wherever located" [113]) by depositing a few million dollars in the account of its counsel, Texas-based Fulbright & Jaworski,[114] is an illustrative example of such behavior.[115] While Yukos had good reasons to seek bankruptcy protection in the United States, rather than its native Russian Federation,[116] the encouragement of such forum-shopping on a global scale would

111. *Id.* at 707. LoPucki correctly notes that it is generally the estate representatives (such as trustees and debtors-in-possession), not the creditors, who control the decision about whether the firm should reorganize or liquidate, and that Westbrook incorrectly assumes it to be otherwise. *Id.* However, discussion of creditors' incentives is nonetheless important here because creditors can generally argue in a bankruptcy proceeding for either reorganization or liquidation. Creditors may further exercise their leverage – at least in the United States – by voting to reject a reorganization plan. *See* 11 U.S.C. § 1126 (2008).

112. . This scenario would not pose a problem under United States substantive law, because of laws governing fraudulent transfers and voidable preferences (11 U.S.C. §§ 544, 548 and the Uniform Fraudulent Transfer Act) and because, even if the debtor were to circumvent those laws by transferring money to its own bank account abroad, the money would not be lost by the estate because the estate includes all of the debtor's assets "wherever located." 11 U.S.C. § 541(a) (2008). But in a more territorialist country (whose domestic bankruptcy law does not purport to govern the debtor's assets abroad, such as Japan before the recent reforms), or one whose fraudulent conveyance laws are less robust, it is easy to imagine how assets could be moved to other countries with no recourse for domestic debtors other than asserting their claim in the foreign country.

113. 11 U.S.C. § 541(a) (2008).

114. *In re Yukos*, 320 B.R. at 132.

115. For background on the Yukos bankruptcy *see In re Yukos Oil Company v. Russian Federation*, 320 B.R. 130 (2004).

116. Such as its (probably well-founded) belief that it would not be treated fairly by a Russian

have disastrous consequences for the predictability of bankruptcy systems. If every debtor that perceived unfairness in its domestic system were able to file abroad merely by transferring a few assets to a friendlier country, it would be impossible for creditors to predict, *ex ante*, the nature of the regime that they would be subject to. Universality discourages such behavior because it leaves bankruptcy proceedings to the debtor's home country, and consequently makes asset placement irrelevant for the choice of law that governs their distribution.

The advantages of universality, if realized, render universality a more efficient system that cuts administration costs and discourages harmful strategic behavior by debtors and creditors. It is precisely these advantages that have made universality the choice system in the academia. But the practical adoption of universality presents grave complications, which I explore below.

C. Disadvantages of Universality

For all of its theoretical superiority, the problems inherent in any practical implementation of a regime of universality are fatal to its success. First, a universalist regime would have to find a way to determine the "home" country of every debtor in a consistent, predictable, and permanent way. Second, such a regime would have to provide for fair treatment of multinational debtors that have national subsidiaries under varying degrees of control by the debtor's "home office," if such a home office indeed exists. Third, universality imposes grave costs on local creditors of multinational debtors when such creditors become forced to defend their interests in a distant court applying unfamiliar substantive law.

Universalists concede that it is impossible to establish a system that would determine, *ex ante*, the "home country" of each debtor.[117] A "we know it when we see it" approach, which universalists claim is sufficient for the vast majority of cases, is unacceptable, and is at any rate insufficient for some of the best-known transnational bankruptcy cases in recent history, including Maxwell Communications Corporation and BCCI.[118] Most universalist-leaning regimes, including the UNCITRAL Model Law and the European Union Convention on Insolvency Proceedings, set the default rule that the country of incorporation is the "home country" for the purposes of insolvency proceedings.[119] But this

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court, particularly in the matter of determining the existence and amount of its alleged tax underpayment and the ability of Yukos to keep its main production facility in the face of alleged design by Russian officials to seize it for the benefit of state-owned Rosneft oil company. *See In re Yukos Oil*, 320 B.R. at 135-37.

117. LoPucki, *supra* note 15, at 713.

118. *Id.* at 713-15. Both debtors were headquartered in one country: Maxwell in the UK, BCCI (*pro forma only*) in Luxembourg with operational headquarters initially in the UK and moved to the United Arab Emirates shortly before bankruptcy; the bulk of their assets was elsewhere (Maxwell's in the United States, BCCI's worldwide). LoPucki takes particular issue with treatment of BCCI, whose bankruptcy was administered by Luxembourg courts due to its incorporation there, despite the fact that BCCI's ties to Luxembourg did not exceed that mere fact. *Id.*

119. European Convention on Insolvency Proceedings art. 3(1), Nov. 23, 1995, 35 I.L.M. 1223 (1996) [hereinafter European Insolvency Convention]; UNCITRAL Model Law, *supra* note 33, at art. 16(3).

presumption may be overridden by a contrary showing in both regimes;[120] the end result is an intense fact-based inquiry, which destroys any hope of predictability that may have existed had the default rule just been left alone. A *per se* rule, which would conclusively set the country of incorporation as the home country, is hardly the solution either. First, if combined with the sort of an automatic-stay provision encountered in the United States, a debtor's filing in one country will prevent creditors from seeking home-country determination elsewhere, thus essentially allowing the debtor to unilaterally choose which country will determine its home country (and thus effectively allow the debtor to choose its own country).[121] Second, it would encourage debtors to choose regimes for their incorporation that may have little to do with their actual economic activity, which would place an enormous burden on creditors – particularly small, local creditors – to acquire information about the regimes of far-away countries. Worse, it will encourage debtors to change their home state on the eve of bankruptcy,[122] suddenly forcing their existing creditors to assert their claims in a brand new system.[123] The incentives for this brand of forum-shopping are considerable, and various countries – such as Bermuda, Luxembourg, and Cayman Islands – may well emerge as possible international bankruptcy havens.[124] These eve-of-bankruptcy moves are fairly common in contemporary practice,[125] and once the venue is thus chosen, its change is highly unlikely.[126] Third, it provides little

120. Model Law, *supra* note 31, at art. 16(3); European Insolvency Convention, *supra* note 119, at art. 3(1).

121. LoPucki, *supra* note 15, at 723. (citing Nakash v. Zur, 190 B.R. 763, 767-69 (Bankr. S.D.N.Y. 1996)) (holding that the creditor violated the automatic stay by filing an involuntary petition against the debtor in Israel).

122. This problem cannot be privately solved by contract alone. If the contract were to trigger an automatic default and acceleration with the debtor's change of incorporation, such contract (and the accelerated amount) would then simply become a claim in the bankruptcy proceeding in the new country. It can only be solved either by law that would refuse to give effect to a change of incorporation that is done less than a certain time before the filing, or by a requirement that would empower the creditor to assert the claim in the old country of incorporation and that would require the court of the new country to cooperate.

123. As already occurs with respect to different venues in the United States. LoPucki notes "rampant forum-shopping" by U.S. debtors and that over half of all U.S. filings occur in venues other than those that universalists would identify as the proper venue. LoPucki, *supra* note 15, at 720-21; *see also* Theodore Eisenberg & Lynn LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968 (1999).

124. LoPucki, *supra* note 15, at 721 (citing also the danger that these countries will have a disproportionate role in setting distribution priorities and other substantive rights for debtors everywhere in the world).

125. *Id.* at 722 (citing examples of Amdura, Baldwin United, Continental Airlines, Evans Products, Memorex, Michigan General, Tacoma Boatbuilding, and the Wickes Companies).

126. *See* GORDON BERMANT ET AL., CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES: REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM 7 (1997); Eisenberg & LoPucki, *supra* note 123, at 1000; Lynn LoPucki & William Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 24-26 (1991) (noting that these cases are said to "grow roots" immediately upon moving to the new venue as executives make decisions and parties hire counsel, making it "unthinkable" to move a case within mere weeks).

guidance on the treatment of the many multinational corporations that operate not as single units but as corporate groups whose loosely-controlled subsidiaries are incorporated in a number of countries.[127] This is a larger problem with universality, to which I now turn.

Great difficulty exists in determining the regime that should govern international corporate groups. Alternatives include treating each legally distinct entity in the group as having its own home country, treating the entire corporate group as having a single home country (which may or may not be that of the corporate parent), and treating the troubled entities as a single unit that has its own home country (which may be determined on some basis other than the country of incorporation).[128] Each is fraught with problems. LoPucki cites a simple yet illustrative example of a corporate group consisting of an American parent (which is not financially troubled) with Canadian and French subsidiaries (both troubled), with the Canadian subsidiary conducting the bulk of its operations through a non-troubled German subsidiary.[129] Under the view that treats each entity as having its home country, the proceedings should take place in Canada and France; under the view that treats the entire group as having a single home country, the United States is the appropriate forum; an alternate view would disregard the Canadian entity's state of incorporation and would instead require it to proceed in Germany due to the fact that the bulk of its assets is located there.[130] The resulting dilemma is that any approach that requires the proceeding to be consolidated in a single country will risk inefficiency by also implicating the solvent members of the corporate group that would have been better off continuing in operation without liquidation or reorganization, and by altering wholly-domestic relationships between solvent subsidiaries and their domestic creditors.[131] On the other hand, any approach that allows the exclusion of solvent members from the bankruptcy proceedings by allowing the proceeding to be commenced in multiple forums will defeat the aims of universality, exclude important assets from the bankruptcy estate,[132] risk destroying the going-concern value of the debtor, and encourage strategic asset-shifting among corporate group members. Moreover, universality allows corporate groups to further manipulate their bankruptcy regime by means of a staggered filing; that is, having some of the group's entities file before others. The proceeding, if consolidated at all, will be consolidated in the home country of the first-filing subsidiary, not in the parent's country because the subsidiary's

127. *See, e.g.*, Heinrich Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983, 993-98 (1952).

128. LoPucki, *supra* at note 15, at 724.

129. *Id.*

130. *Id* at 717-718.

131. *Id.* at 718-20 (citing the bankruptcy of Bramalea Limited, whose Canadian bankruptcy filing had precisely this effect on the relationship of its solvent American subsidiaries with their domestic creditors); *see generally* R. GORDON MARANTZ, *The Reorganization of a Complex Corporate Entity: The Bramalea Story, in* CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATIONS 1, 30 (Jacob Ziegel ed., 1997) (detailing the Bramalea story).

132. *See* LoPucki, *supra* note 15, at 720.

country's court will already be on the way in resolving the case.[133]

Third, universality imposes grave costs on local creditors. Under universality, a debtor is required to file in its "home country" which, as we have seen, may be quite different from the country in which the bulk of its economic activity takes place. For example, a small British company that sells auto parts on credit to the British automaker Jaguar, may suddenly find itself having to defend its interests in Delaware, and assert its priority under the U.S. Bankruptcy Code, if the Ford Motor Company, the current corporate parent of Jaguar, were to file for bankruptcy there. Different substantive priorities and different treatment of similar claims in different countries makes the *ex ante* pricing of credit impossible without accurate information about substantive foreign law. In many cases, the mere fact that the debtor actually has a foreign "home country" is not immediately apparent to creditors. Even in cases where it is apparent, smaller creditors will still be disadvantaged because they cannot accurately evaluate their risks and exposure under foreign bankruptcy law, and thus cannot price their credit accurately.

The combination of these practical problems is fatal to the ability of universality to realize its potential. While a universalist world would, in theory, be more predictable, no universalist system proposed to date has been able to overcome the hurdle of resolving the threshold questions about the home country of the debtor or about the prejudice that occurs to domestic creditors. As a consequence, universality remains an unworkable system.

D. Corporate-Charter Universality

A more promising universalist proposal is advanced by Rasmussen.[134] Under his proposal, each debtor would have the ability to choose its bankruptcy country – that is, both the forum and the law, with the sole requirement that the forum apply *lex fori* (law of the forum) – to which its bankruptcy would be subject.[135] The country would then function as the "home country," and administer the proceeding in accordance with the principles of universality.[136] The debtor's choice would be made at incorporation, changeable only with the consent of the creditors, and publicly available to any prospective creditor *ex ante*.[137] This approach, in essence, bypasses the most dangerous component of universality, which is the determination of the debtor's home country for bankruptcy purposes. As a result, it would eliminate strategic behavior by debtors, eve-of-bankruptcy reincorporation, and other tactics that undermine the integrity of universality. Moreover, it would abandon traditional choice-of-law principles and give the debtor and its creditors more flexibility in choosing the debtor's bankruptcy regime, unhampered by considerations of country of incorporation, country of headquarters, and country of the majority of assets.

133. *Id.* at 723.

134. Rasmussen, *supra* note 7, at 32-35.

135. *Id.* at 32.

136. *Id.* at 27.

137. *Id.* at 5.

Rasmussen's regime is less objectionable than traditional universality for those reasons. Nonetheless, its flaws are considerable. In addition to problems already enumerated, the system will impose extreme costs on nonconsensual creditors of the debtor, such as tort victims. Debtors – particularly those prone to tort liability – will have an incentive to choose the country that is as hostile to plaintiffs as possible for their bankruptcy home.[138] As a result, tort victims will be systematically undercompensated and will, as a class, effectively bear the cost of any efficiency gains that may be passed on to the debtor and other creditors. A possible solution is proposed by Rasmussen himself: have each country that has tort creditors conduct "fairness hearings" before requiring its domestic tort creditors to go to the debtor's home country.[139] But the cure is just as bad as the disease. While tort victims will benefit, the overall predictability of the system would suffer. A German creditor, for example, would have to adjust the terms of its credit to a debtor that elected France as its bankruptcy regime based on the debtor's potential tort liability in the United States. Moreover, the solution will not work if the country where the debtor faces tort exposure is also a country where it does not have many assets, because in the absence of foreign courts' cooperation, the seizure of the debtor's assets is essentially the only leverage that the tort country's court has against the debtor.

IV. AN INTERNATIONAL REGIME?

A minority of commentators – notably Westbrook– advocate the use of an international body to resolve transnational bankruptcies.[140] In such a system, an international court would have exclusive jurisdiction over all transnational bankruptcy cases.[141] Under various versions of the proposal, the international bankruptcy court would apply either the domestic law of the debtor, or a new body of substantive international bankruptcy law.[142] Both the international bankruptcy court and any possible substantive law would be created by convention or treaty. Domestic courts of individual countries would participate in the process only to the extent necessary to enforce the judgment of the international bankruptcy court (for example, ordering that assets be seized and turned over to the international bankruptcy court).

Proponents of such an international system claim two overriding advantages. First, a purely international system would be the model of predictability and uniformity. There would never be any guesswork about the forum that would take control of the proceedings because only one such forum would exist. Moreover, under the version of the proposal that favors creating a single body of substantive

138. *See* LoPucki, *supra* note 15, at 739-40 (citing Goldberg v. Lee Express Cab Corp., 634 N.Y.S. 2d 337, 338 (Sup. Ct. 1995) as an example of the length to which some debtors go, *ex ante*, to limit their tort liability). In *Goldberg*, the court noted the common practice of taxicab companies to create a separate corporation for each taxicab, thus making the rest of the taxi fleet immune from any possible tort judgment against an individual single-cab subsidiary. *Id.*

139. Rasmussen, *supra* note 7, at 35.

140. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292-98 (2000).

141. *Id.* at 2292-93.

142. *See id.* at 2292-93.

law, every creditor, large or small, would know exactly its prospects in a potential bankruptcy proceeding, and would thus price its credit accurately. Instead of being forced to learn dozens of foreign regimes, as under universality, creditors would only need to know one.

The second claimed advantage is that the international nature of the regime would be fair to all creditors and debtors, regardless of their national origin. No court would have to decide the allocation of costs between "domestic" and "foreign" creditors because all creditors would, in a sense, be equally "foreign" to an international body. Similarly, substantive law would eliminate any built-in bias in favor of "domestic" and against "foreign" creditors. Composition of the court can easily be set in such a manner as to minimize or eliminate any possibility for favoritism.

The international organization regime, however, is even less of a workable solution than universality. If the regime administered by an international organization is to be any more predictable than universality, there must exist a single body of substantive law that the international organization would apply. To allow domestic laws to remain applicable to transnational bankruptcies under such a scenario is to invite the same uncertainty and manipulation as universality would allow (minus, of course, the choice of the forum itself). Even if the international bankruptcy court were to have its own criteria for determining the identity of the debtor's "home country," debtors can still re-incorporate, move their headquarters, or shift assets as easily as they can under universality. Accordingly, we are left with a system that would create both a forum and a body of substantive law to resolve transnational insolvencies.

Regrettably, the very reason why an international solution to transnational bankruptcy is needed is also the reason why an international body of substantive bankruptcy law cannot work: nations have vastly differing economic priorities. National decisions about economic priorities are influenced by a host of factors, ranging from development objectives, to attraction of foreign capital, to moral judgments. These unique economic priorities become expressed in national bankruptcy systems. In the present day, these systems exhibit a dizzying array of diverse choices about the scope of the estate, claim recognition, class treatment, creditor priority, available remedies, and just about all other aspects of bankruptcy proceedings.[143] It is this rich diversity of policy choices on the global scale that makes transnational bankruptcy so unpredictable and a uniform regime desirable. It is also this diversity that will prevent any consensus with respect to substantive law. Consensus has been elusive even in fairly closely-knit geopolitical units such as the European Union, whose members – save perhaps for the recent arrivals from the former Eastern Bloc – are largely well-established, industrialized, powerful economic players in a similar stage of development.[144] If substantive consensus

143. *See* LoPucki, *supra* note 10, at 2224-25.

144. *See* European Insolvency Convention, *supra* note 119, at art. 4(2) (explicitly leaving questions of substantive law – such as scope of estate, treatment of assets, powers of debtor and liquidator, effects of bankruptcy on debtor's current obligations, recognition of claims, distribution of assets, ranking of claims, and others – to the domestic law of the state that is administering the bankruptcy)

cannot be achieved in Europe, there is little hope that a consensus on substantive law can be had on a global scale. Without consensus, the regime cannot take hold and will die in one of two ways: it can attempt to be substantively comprehensive, but secure the ratification of only a few countries that share the same economic priorities; or, it can attempt to secure broader participation at the expense of substantively meaningful provisions. Either way, a comprehensive regime that would govern substantive issues – such as scope of estate and priority of claims – is currently impossible on a worldwide scale.

V. COOPERATIVE TERRITORIALITY AND BEYOND

A. Overview

Professor LoPucki proposes a regime that she calls cooperative territoriality to govern transnational insolvency proceedings.[145] The system is not flawless; however, with some adjustments, this approach is the most practically workable paradigm of all that are presently discussed in the literature.

Cooperative territoriality is similar to classic territoriality.[146] Under cooperative territoriality, separate and coequal bankruptcy proceedings occur in each country in which the debtor has assets.[147] The court of each of those countries would administer those assets, and only those assets, that are located within that country.[148] *Lex fori* would govern the substantive issues in each proceeding.[149] Two critical differences would distinguish the regime from classical territoriality, however. First, cooperation among courts would reduce administrative costs and reduce wasteful duplication without compromising the participating countries' sovereignty. Second, disputed claims would be litigated in a single forum with binding effect on all other countries.

The first form of cooperation that LoPucki proposes concerns the process of filing and allowing claims.[150] Under classic territoriality, a creditor that wants to have access to the debtor's assets worldwide would need to file its claim in each country in which the debtor has assets. Under LoPucki's proposal, the creditor would only file in one country.[151] The claim would be automatically deemed allowed in each country in which the bankruptcy proceeding is pending, unless the trustee in such other country objected to the allowability of the claim based on local substantive law. The creditor would then have a choice of whether to press for the allowance of the claim in that foreign court, or simply give up and focus its attention elsewhere.

The second form of cooperation that LoPucki proposes concerns litigating disputed claims.[152] Two alternatives exist for such process. Under the first possibility, a creditor would litigate its disputed claim in its home country. The

145. LoPucki, *supra* note 15, at 750-60.
146. *See id.* at 742.
147. *See id.*
148. *Id. at 742-43.*
149. *See id.* 742.
150. *See id.* at 753-55.
151. *See id.* at 750-55.
152. *See id.* at 754-55.

judgment of that court would then become binding on all other courts that are administering the bankruptcy around the world. The second alternative would require the litigation of disputed claims in each country in which they are disputed. LoPucki naturally favors the first alternative, but recognizes that the courts' current reluctance to always give effect to foreign judgments will likely impede the chances of this approach taking hold.[153] I will now explore advantages and disadvantages of the LoPucki proposal and propose modifications that will likely improve the system's chances for success.

B. Advantages

The LoPucki approach captures all advantages of classic territoriality.[154] First, cooperative territoriality is eminently predictable. The regime that will govern the distribution of a particular asset is governed by the law of the place where that asset is located. The complicated and unpredictable process of ascertaining the debtor's home country is eliminated from the equation. Second, it allows local creditors to litigate in a close, convenient forum, and be governed by domestic law, rather than being illogically forced into a distant forum to litigate a purely domestic dispute. Like classic territoriality, it is also superior in its treatment of global corporate groups. It treats each national entity of a global corporate group as a separate debtor, and thus conforms to the expectation of creditors who were dealing with that particular entity.

It also adds some advantages of its own. It takes the most efficient aspect of territoriality – the cost savings arising from each court's ability to focus solely on domestic assets and laws – and it enhances it with the cooperation requirement. If a large multinational debtor has thousands of claims filed against it in bankruptcy, and the majority of those claims are uncontested, the fact that such claims will be allowed globally represents significant cost savings in relation to the existing regime. Even if the filing of a claim is a largely automatic process in each individual court, the expense involved in filing such claims separately, multiplied by thousands of creditors and hundreds of cases, can be considerable. Moreover, the automatic allowance of such claims will not significantly increase the expenditure of judicial resources in the allowing countries because, by hypothesis, these claims are uncontested. The automation of the process is thus a laudable step forward.

Cooperative territoriality also reduces (but does not eliminate) incentives for strategic asset placement by debtors who want to avoid tort liability in a particular country. By allowing easy cross-recognition of claims among the various national estates created by the concurrent proceedings, no portion of the debtor's assets would be inaccessible to the debtor's creditors. The process would be aided even more greatly if automatic recognition of the judgments determining claim amount could be secured in the bankruptcy context. However, even without automatic recognition, cooperative territoriality represents an improvement over the status quo.

153. *See id.* at 755-56.

154. *See id.* at 751-53.

Similarly, cooperative territoriality neutralizes some (but not all) incentives that, under the model proposed by Bebchuk and Guzmán, cause inefficient allocation of capital.[155] The model predicts that in a world with a mix of territoriality and universality, disproportionate and socially inefficient investment would occur in countries that have adopted territoriality. That is so because creditors in territorialist countries stand a better chance of being repaid in bankruptcy and will thus be able to offer more competitive interest rates, and debtors will consequently be more likely to borrow and invest in territorialist countries. Cooperative territoriality addresses this shortcoming in several ways. First, as already stated, it partially erodes some of the barriers to recovery that creditors in universalist countries will have. That is, when a creditor from a universalist country must assert its claim, such a creditor need only file a proof of claim in its home country's court for the claim to automatically be allowed in all countries in which the debtor has assets. Such a creditor need not face the cost of filing its proof of claim in dozens of countries, nor establish the allowability of the claim in each country. Of course, when the claim is objected to, the debtor must still choose between defending and forfeiting it. However, that process is no worse than current practice. Secondly, if a mechanism is adopted by which the allowance of a disputed claim by one country can be made binding on others,[156] the costs associated with such litigation would dramatically decrease. Under current practice, the debtor would have to file each proof of claim independently and only then respond to objections on a country-by-country basis.

C. Disadvantages

The LoPucki proposal is not without flaws. First, some of the disadvantages of classic territoriality, such as the high cost of multiple concurrent proceedings, are plainly inherent in cooperative territoriality. Second, as already stated, it does not completely eliminate the built-in incentives in territoriality that cause inefficient allocation of capital. To be sure, cooperative territoriality is likely to fare far better than conventional territoriality in those respects, but any regime that allows for differing likelihoods of recovery by creditors based on their location will, to a degree, have the same effect.

The LoPucki proposal does not so much introduce disadvantages that did not exist in the world of classic territoriality, as it fails to resolve the questions that it raises. LoPucki, for example, proposes the automatic allowance of claims in all countries once they have been allowed in one country. But also, she urges that debtors be able to prevent such automatic allowance by merely filing an objection. Consequently, any efficiency gains that automatic allowance would bring would become obliterated as the exception swallows the rule. In the following section, I propose a solution to the automatic-allowance dilemma that will likely streamline the process, save costs, and still allow each country full control over decisions that affect its sovereignty.

Another flaw with the LoPucki system is that it recognizes that debtors will

155. *See* Bebchuk & Guzmán, *supra* note 44, at 789-90.

156. *See* discussion *infra* Part V. D.

have an incentive to shift their assets to countries that will shield them from various types of creditors, yet does not propose a system to address this problem beyond a vague suggestion that the countries might cooperate with one another to prevent this from occurring. I propose a comprehensive system to resolve this issue, and I also discuss it in the next section.

D. Proposed Improvements

I propose several modifications to the LoPucki proposal that, if implemented, will increase the potential of cooperative territoriality to be an efficient means to streamline the process of transnational insolvency. These modifications may be adopted by way of treaty or convention.

First, I propose a modification in the process of allowing claims. Claims allowed in the creditor's domestic courts should be conclusively presumed allowed in all other counties' courts, with only two enumerated exceptions. The first such exception can occur if there exists an international agreement that a particular kind of claim is not allowable. For example, suppose that there came into existence an agreement stipulating that punitive damages are never allowable in any transnational bankruptcy case.[157] In such a scenario, the creditor's domestic court would disallow the creditor's claim for punitive damages in the first instance. The second exception would occur if the allowance of the claim is against an express law of the country that is asked to allow the claim. The second exception should be construed extremely narrowly, and individual countries would be permitted to disallow claims only in the existence of a specific law that prohibits such allowance. For example, suppose there were no international punitive damage agreement, as there was in the previous hypothesis. Suppose further that the creditor's country allowed punitive damages. Finally, suppose that the country in which a substantial chunk of the debtor's assets is located does not have punitive damages in its tort law. Under my proposal, the second country would be required to allow the creditor's claim because although it does not permit punitive damages in tort, it does not have an explicit rule banning the inclusion of foreign punitive tort damages in bankruptcy. If the second country decided to pass a law banning punitive damages from other countries from being included in bankruptcy, then it would be permitted to disallow them. This requirement goes a step past ordinary principles of comity. Under conventional comity, the second country would be permitted to disallow the punitive damage claim if it conflicted with a fundamental policy of the second country. This standard, although well-established, falls short of offering predictability. The deciding court often has to determine what public policy is, often in the absence of explicit legislative guidance. It then has to decide whether the proposed action will violate that public policy. Under the "comity-

157. Such an agreement is not merely an academic possibility. Many countries do not allow punitive damages at all. Even others, such as the United States – where punitive damages are jokingly referred to as a national pastime – grant punitive damages only a very low priority in domestic bankruptcies. *See* 11 U.S.C. § 726(a)(4) (2008) (listing punitive damages as a low priority in liquidation); *see generally* Menard-Sanford v. Mabey, 880 F.2d 694 (4th Cir. 1989) (holding that, in the bankruptcy that followed the Dalkon Shield IUD litigation, the court had equitable power to disallow or subordinate punitive damages).

plus" proposal, the court's discretion would be far more limited. No court would ever be required to make pronouncements of public policy. The allowance or disallowance of the claim would be predictable with a simple look at the country's statute dealing with the allowance of specific claims. If the *allowance* of the claim is not expressly prohibited, then it must be allowed, even if the underlying claim does not exist according to the country's domestic law, and even if the country's public policy opposes such claims. Moreover, each country would have a perfectly safe way to preserve its sovereignty by disallowing claims that it finds inappropriate: all it would have to do is pass an explicit law to that effect. If France, for example, decides that punitive damages are the province of *les Américains litigieux*, it is perfectly free to outlaw the allowance of foreign punitive damages by its domestic courts. Otherwise, it is free to continue to prohibit punitive damages in its domestic courts but allow them when it administers a portion of the estate of an American debtor with American liabilities.

The most obvious criticism of this proposal comes from the fact that debtors will have a tremendous incentive to shift assets on the eve of bankruptcy to countries that will shield them from undesirable exposure. However, this problem can be addressed by adopting a set of international principles of fraudulent transfers.[158] Current law relies on the creditor's domestic court to make the determination that a fraudulent transfer has been made, and on the foreign court to enforce it under the principles of comity. The incentive for the foreign court not to grant comity to the fraudulent transfer judgment of the domestic court is too great, particularly if the transfer was made to avoid liability under a law that is repugnant to the foreign country.

I propose that an international system governing fraudulent transfers be adopted by convention or treaty. The agreement would set uniform guidelines for what constitutes a fraudulent transfer. It would not need to delve into whether the fraudulent transfer ought to be permissible if it is made to avoid liability under some repugnant law because each country would have independent ability to disallow claims based on such liability. The agreement need not even define the standards for intent to defraud; it could merely treat all transfers made within a certain time before filing as fraudulent and thus avoidable. The agreement, accordingly, would not need to make substantive determinations on subjects that divide the international community, and would thus be likely to be widely adopted.

Suppose, as earlier, that France abhors punitive damages in tort. Suppose further that France imposes civil fines for the display of Nazi memorabilia,[159] while the United States opposes such fines on free-speech grounds. Under my proposed agreement, United States and France would not need to negotiate with each other about the substantive merits of either punitive damages or fines for Nazi

158. LoPucki suggests a system of cooperation among countries to prevent the problem of "fleeing assets" but does not present a concrete proposal. *See* LoPucki, *supra* note 15, at 758-59. Instead of *ad hoc* cooperation, which is the essence of LoPucki's treatment of the subject, I propose a system of per se rules that would conclusively determine transfers to be avoidable.

159. *See. e.g.*, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

displays. Both could agree to uniform principles under which each would render assistance to the other under a fraudulent transfer convention – such as, for example, treating all transfers made within six months before filing as conclusively fraudulent. If the United States is opposed to the Nazi fines, it can then disallow them at the local level by passing a law that prevents the allowance of, for example, all claims based on liability for the content of commercial speech, with the necessary exceptions such as fraud, unfair competition, trademark infringement, or securities liability. Conversely, if France is opposed to punitive damages, it can keep them out of its courts by passing a law that bans the allowance of all extra-compensatory damages.

This modification to the cooperative territoriality proposal offers greater predictability than the LoPucki proposal, which permits for the disallowance of claims on ordinary "public policy" grounds. At first blush, the modification would appear to be labor-intensive: each country would have to come up with a list of claims that it would want disallowed. However, the process is effectively a one-time commitment. Once implemented, the courts' decision about the allowance of claims becomes as simple as determining whether the claim is expressly prohibited from being allowed. The political branches of the government will thus be charged with determining what, in essence, is a decision of foreign policy. The courts' decisions will thus be both more predictable and more responsive to political reality.

The second criticism is that the "comity-plus" requirement will simply allow the political branches to block cooperation instead of the courts. In other words, instead of courts refusing to extend comity, it would be the political branches of the government that would prohibit the allowance of claims. The criticism is partially deserved; however, my proposal still allows for far greater cooperation than is possible in the status quo. Typically, it is the political branches that are responsible for a country's foreign policy. They are thus in the best position to bargain with other countries about the substantive rules governing allowance and disallowance of claims. It will thus be far easier for political branches to permit greater allowance of claims than it is for courts under the current principles of comity. Courts strive to follow precedent and will not declare that public policy has changed overnight. Political branches, on the other hand, are free to fashion foreign policy, bargain for greater allowability of claims, and create domestic laws in accordance with the country's economic needs.

In sum, my first proposed improvement consists of the following parts. First, I propose a further automation of the claim allowance process. A claim filed in one country would be disallowed only if it either (a) is internationally agreed to be an impermissible claim, or (b) if its allowance is expressly against the domestic law of the country, which is asked to allow it. Otherwise, the claim becomes automatically allowed in all countries in which the debtor's bankruptcy is pending. Second, I propose an international (if minimalist) system of cooperation on fraudulent conveyances that would deter debtors from transferring assets to countries that disallow claims that are based on the debtors' actual or potential liabilities.

My second proposal deals with claims where the liability is not disputed but

the amount is. For example, suppose that a United States trustee rejects an executory contract that the debtor had with the creditor. The contract is deemed breached and the creditor becomes entitled to money damages, whose priority is that of a general unsecured creditor.[160] In the United States, the breach is deemed to have occurred at the time that the petition is filed.[161] But suppose that in Japan the breach is deemed to have occurred at the time that the trustee chose to reject the executory contract. Suppose further that, under the applicable provisions of the Uniform Commercial Code, the creditor is entitled to expectation damages, but under Japanese law, the creditor is entitled only to reliance damages. Suppose that as the result, the creditor's claim under the U.S. law is $3 million, while under Japanese law it is only $2 million. Suppose further that the debtor is a Japanese company with some U.S. assets and that the creditor is American. Finally, suppose that Japanese courts have declared that it is a matter of vital public policy to only allow reliance and not expectation damages in breach of contract cases, taking this out of the realm of decisions where comity might be extended. LoPucki suggests that it would be desirable to have the Japanese court enforce the full $3 million, but that is unlikely, unless the creditor makes a showing in the Japanese court that it is entitled to the full amount it seeks.

It is of course desirable to have a single court determine the amount of the claim. But for Japan to allow the United States' courts to channel an extra million dollars to an American creditor is to accept a decision which violates its vital public policy, which is counter to its sovereignty, and which it will not do under the principles of comity. Accordingly, alternative ways must be found to address the problem.

I propose that the excess $1 million be treated as if it were a separate claim that is allowed by the U.S. but disallowed by Japan. The burden would be on Japan to pass a law that would prohibit the allowance of all contract damage claims in excess of what is recoverable under the reliance measure. The American creditor would then establish its claim in the United States, obtain a separate finding on the recoverable amount under the reliance measure, and take that reduced claim to Japan. The creditor would then have to assert its claim for $1 million in the United States alone.

The above proposal should be viewed in light of the aim of cooperative territoriality—that no country should be required to apply the substantive law of another country. I propose that the only exception to this principle should be to allow the court to conform its judgment to standards that would be acceptable in the foreign country. Such departures should be kept to an absolute minimum. For example, domestic courts can easily decide what would be the proper amount of damages, if the date of breach were later rather than sooner, if the measure of damages were reliance rather than expectation, or if the award excluded punitive damages rather than included them. Domestic courts can then decide the issue based on domestic law, and make separate auxiliary findings that would then be

160. 11 U.S.C. § 365(g) (2008).
161. *See id.*

binding on the foreign court. The sole foreign laws that domestic courts would then have to apply are the foreign laws governing the allowability of foreign claims. Knowing that in advance, all countries can enact such laws in a manner that would be most conducive to easy and predictable interpretation by foreign courts. Moreover, foreign courts of different countries may use each other's interpretations of such laws as precedent.

Under both of my proposals, one question remains: what priority should be given to the residual amount of the claim that is not allowed in the foreign court? In the first example, if the French government's claim for fines for Nazi paraphernalia is disallowed by the United States, should France be allowed to give it higher priority in its domestic proceeding? Conversely, should the U.S. creditor be allowed to increase the priority of its claim for $1 million of contract damages that it would not get under the Japanese measure of reliance? My answer to that is that no special priority should be given in domestic proceedings to such claims. In the simple examples that I provided, higher priority may not present an issue. But imagine a proceeding where the debtor files in dozens of countries, some of which allow the claim and some of which do not. How does one set the threshold about the elevation of the claim's priority domestically? By the number of allowing countries? By their percentage of the total? By the amount or percentage of assets based therein? In any event, the elevation of domestic priority of such claims is likely to cause more problems that it would solve. But if elevated priority is in fact granted (and domestic political pressures may well end up dictating such a result), such priority must be granted based on clear and explicit criteria and numerical thresholds that would allow *ex ante* predictability of the claim's fate.

VI. CONCLUSION

Having established a need for a transnational bankruptcy system, we have turned to a brief survey of various regimes in scholarship and practice. We examined the regime that begins to show signs of widespread adoption – the UNCITRAL Model Law – and concluded that, while an improvement over prior law, it does not provide the most efficient resolution to the problem.

We then examined the various theoretical frameworks on which a transnational bankruptcy regime may be based. We looked at classic territoriality, and concluded that it offers a moderately predictable system, and it is fair to local creditors who are allowed to litigate their claims in a local forum. But our praise for the regime was tempered by three strong reservations: that it is too costly, that it provides incentives for harmful strategic behavior, and that it causes inefficient allocation of capital in borrowing and investment decisions. We acknowledged that territoriality is largely the rule in the status quo, but we hesitated to embrace it because of its drawbacks.

We then looked at universality and explored the advantages that make it so appealing to many academics. The idea of a single proceeding in a single country that would dispose of the entire case, without the costly duplication of effort, seemed attractive. Equally attractive seemed the promise of universality to eliminate forum-shopping by debtors (who would be forced to file in their home country) and the elimination of their ability to escape justice by moving assets around. But we were then forced to reject universality because in reality, it would

create more insidious forms of forum-shopping than it would prevent, and collapse into complete unpredictability with respect to the outcomes that it delivers. Moreover, universality cannot adequately deal with a world economy dominated by corporate groups that are compartmentalized by country, and cannot adequately protect the interests of local creditors whose only avenue for protecting their interests in a purely domestic dispute would be to litigate in a foreign forum. Accordingly, universality was not the answer. Neither was corporate-charter universality, a close cousin of classic universality, because while it addressed many of universality's flaws, it could not provide adequate treatment for tort creditors. Further, it was likely to reduce competition in the credit market by imposing disproportionate costs on smaller creditors. We then briefly examined and rejected a solution based on the creation of an international bankruptcy court as practically unworkable.

Finally, we looked at cooperative territoriality. We concluded that cooperative territoriality captured all of the advantages of classic territoriality and reduced many of its drawbacks. We examined the model proposed by Lynn LoPucki and concluded it to be workable with several modifications. Finally, we explored those modifications – specifically a streamlining of the claim allowance process based on a "comity plus" model, a fraudulent transfer agreement, and a two-step process for allowing claims whose amount is disputed – and concluded that, while far from flawless, the modified cooperative territoriality approach was likely to work best for transnational insolvency proceedings.

VEILED IMPUNITY: IRAN'S USE OF NON-STATE ARMED GROUPS

KEITH A. PETTY*

The only strength of Iran is the weakness of the international community vis-à-vis Iran.

– Shimon Peres[1]

I. INTRODUCTION

In December of 2006, thousands of Hezbollah supporters crowded the streets of Beirut, angrily demanding that Prime Minister Siniora's government step down. This followed several months after armed members of Hezbollah crossed the Lebanese border into Israel and murdered three Israeli soldiers and kidnapped two others, precipitating the July War of 2006. In Iraq, Shi'a death squads – including members of Muqtada al-Sadr's militia – roam the streets of Baghdad, murdering Sunni Arabs and suspected collaborators of the U.S. led coalition. They, along with well placed Sadr supporters in the Iraqi government, seek to change the shape of the political landscape in Iraq, guaranteeing Shi'a dominance. In the Gaza Strip in June 2006, members of Hamas crossed underground into Israel, killed two Israeli soldiers, and kidnapped a third. Only six months prior to this, Hamas won a landslide victory in parliamentary elections. Each of these groups – Hezbollah, Mahdi's Army, and Hamas – is a non-state armed group that is financially, politically, and ideologically supported by Iran. As such, their actions may be attributed to Iran.

Iranian support of non-state armed groups is not limited to the three groups listed above. In fact, Iran provides support to groups all over the world in what has become a cornerstone of its foreign policy. By supporting these groups, Iran seeks

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1. The Honorable Shimon Peres, Deputy Prime Minister of Isr., Member of Knesset, Washington Institute for Near East Policy, Special Policy Forum: Israel: The War Against Hizballah and the Battle Against Hamas (Aug. 1, 2006), *available at* the website of the Washington Institute for Near East Policy, http://www.washingtoninstitute.org/documents/44d7361fc2685.pdf.

to accomplish multiple objectives, including: increasing Iranian influence in the Middle East while limiting Sunni Arab influence, destroying Israel, and limiting or eliminating U.S. influence in the region.

The level of sophistication of Iran's approach to indirect aggression is particularly noteworthy. Rather than using their own armed forces and engaging in open hostilities with adversaries, Iran cultivates non-state armed groups within the territory of, or directly adjacent to, other States. These non-state armed groups develop parallel military and political branches to rival the target State they seek to destabilize or overthrow. Iranian-backed armed groups are not limited, as are other State sponsored groups, to the blunt use of force to achieve its strategic objectives.

Surprisingly, Iran's use of non-state armed groups as an extension of its foreign policy has not met significant deterrence. Many still believe that aggression can only be committed when a State openly attacks another State with military force, a misperception of *jus ad bellum* law. This paper suggests a closer analysis of what constitutes unlawful aggression under international law. Specifically, the issue is whether State support of non-state armed groups as a means of threatening the territorial integrity or political independence of another State constitutes unlawful aggression.

Several aspects of Iran's involvement with non-state armed groups must be discussed before reaching these determinations. The general framework of these groups and a detailed discussion of Iran's support to Hezbollah, Iraqi insurgents, and Hamas are found in Section II. Iran's strategic objectives as well as its sophisticated use of armed groups are discussed in Section III. Whether Iran's use of non-state armed groups against target States amounts to aggression is analyzed in Section IV. The final section, Section V, provides recommendations and conclusions for policy and law-makers interested in deterring Iran's use of armed groups as a means of foreign policy.

II. THE UNLAWFUL NATURE OF NON-STATE ARMED GROUPS & IRANIAN SUPPORT

Iran is responsible, financially and materially, for a new Shi'a strength in the Middle East due largely to its support of non-state armed groups.[2] Jordan's King Abdullah voiced concern over Iran's new "crescent" of influence running from Tehran through Iraq and Syria to Lebanon.[3] This is a sentiment shared by many Arab leaders, including King Abdullah of Saudi Arabia and Egyptian President Hosni Mubarak.[4]

Non-state armed groups can be categorized into four different groups: insurgents, terrorists, militias, and criminal organizations.[5] The emergence of the increased capabilities of armed groups to attack States in the post-Cold War era

2. Bobby Ghosh, *Behind the Sunni-Shi'ite Divide*, TIME.COM, Feb. 22, 2007, http://www.time.com/time/magazine/article/0,9171,1592849,00.html.

3. *Id.*

4. *Id.*

5. RICHARD H. SHULTZ, JR. ET AL., ARMED GROUPS: A TIER-ONE SECURITY THREAT, U.S. AIR FORCE INST. FOR NAT'L SEC. STUD. 16, INSS Occasional Paper 57 (2004), *available at* http://www.usafa.af.mil/df/inss/OCP/ocp57.pdf [hereinafter SHULTZ, TIER ONE].

had a powerful impact on the State system.[6] Similarly, Iran's use of these groups introduces a new threat within that paradigm. Iran exploits four of the basic characteristics of non-state armed groups to achieve its strategic goals. These characteristics include: challenging the legitimacy of the State, using force as a primary instrument, maintaining local and global capabilities, and failing to recognize democratic principles and the rule of law.[7] Iran, however, changes this dynamic by using armed groups to undermine State legitimacy through methods other than the open use of force.

Historically, armed groups have used force as their primary method of threatening a State's political independence. In 1977, the United Nations (U.N.) Security Council condemned the unlawful aggression committed by mercenaries against the Republic of Benin.[8] While direct attacks against a State are sometimes committed, these groups tend to employ indirect and prolonged violence to exert their influence. This is the case in Colombia, Lebanon, and the Philippines.[9]

Some non-state armed groups attempt to legitimize their efforts by establishing a political wing and by providing public services. This can result in a State within a State, as was the case of the Maoist Rebels in Nepal.[10] Of these attempts at legitimacy, one expert comments:

> It is true that some armed groups maintain political and paramilitary wings and that the former may, for tactical reasons, eschew violence. Still, the use of force is a critical instrument for these organizations, regardless of how they may seek to mask that fact. Violence is used instrumentally to achieve political and/or other objectives.[11]

In his article, "Era of Armed Groups," Richard H. Schultz discusses six defining aspects of armed groups. They are: leadership, rank and file membership, organizational structure and functions, an ideology or political code of beliefs and objectives, strategy and tactics, and links with other non-state and State actors.[12] The following Section focuses on the last of these, namely, Iran's ties to non-state armed groups.

A. Hezbollah, Iraqi Insurgents, & Hamas

Typically, non-state armed groups are used by States to supplement regular armed forces. Iran, however, uses non-state armed groups as a central component of its foreign policy.[13] By providing these groups with a combination of political,

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6. *Id.* at 3.

7. *Id.* at 13-17.

8. S.C. Res. 405, U.N. Doc. S/RES/405 (Apr. 14, 1977).

9. Richard H. Shultz, Jr., *The Era Of Armed Groups*, *in* THE FUTURE OF AMERICAN INTELLIGENCE 1, 1 (2005) [hereinafter Shultz, *Armed Groups*].

10. IRINNEWS.ORG, *Nepal: Rebels accused of running parallel government*, Sept. 14, 2006, http://www.irinnews.org/report.aspx?reportid=61695; *See also* BBCNEWS, *Nepal Maoists Disband Government*, Jan. 18, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/sout_asia/6273535.stm.

11. Shultz, *Armed Groups*, *supra* note 9, at 10.

12. *Id.*

13. *See* James M. O'Brien, Exporting Jihad: Iran's Use of Non-State Armed Groups 3 (Mar. 29, 2006) (unpublished M.A. thesis, Tufts University) (on file with The Fletcher School, Tufts University).

ideological, financial, and military backing, Iran exercises a unique sophistication in threatening the political independence of States. Rather than using direct force – and not as innocuous as winning elections – these groups undermine the legitimacy of recognized governments through their actions.[14]

Some of the groups that Iran supports include: the Armed Islamic Group in Algeria, Hamas in the Palestinian territories, Hezbollah in Lebanon, the Islamic Courts in Somalia, and several insurgent groups in Iraq such as the Badr Organization and Mahdi's Army. For the purpose of brevity, this paper will limit its focus to Hezbollah, Mahdi's Army and the Badr Organization in Iraq, and Hamas.

B. Hezbollah: A Threat to International Law & Politics

The most prominent non-state armed group backed by Iran is the Lebanon-based Hezbollah organization, designated by the U.S. Department of State as a foreign terrorist organization.[15] But to categorize Hezbollah merely as an organization that commits acts of terrorism is to overlook its dual threat to regional stability – the military and political aspects of the organization.[16] Members of Hezbollah's political wing hold seats in the Lebanese parliament and serve in Prime Minister Siniora's cabinet. The organization also maintains social institutions and provides basic services for southern Lebanon. In fact, it is a parallel political and military organization to Lebanon's duly elected government.[17]

Hezbollah was Iran's first use of a non-state armed group to achieve its strategic goals.[18] Closely following the aftermath of Iran's revolution several years before, Hezbollah was created in 1982 as a result of Israel's invasion of Lebanon.[19] Its ideology consisted of protecting the Lebanese Shi'a population from Israeli occupation and expanding Iran's brand of Shi'a extremism.

During the Lebanese Civil War, Hezbollah carried out attacks against Israeli, Western, and other targets suggesting Iranian involvement. These attacks include: the 1983 suicide bombings of French Headquarters and U.S. Marine barracks in Beirut, killing 58 French soldiers and 241 Marines; the 1984 hijacking of an Air France passenger jet; and the 1988 bombing near Saudi Arabian Airlines offices in Kuwait City – likely a result of Saudi Arabia's severance of diplomatic ties with Iran just weeks before.[20]

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14. *Id.* at 91-95.

15. OFFICE OF COUNTERTERRORISM, U.S. DEP'T. OF STATE, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (Oct. 11, 2005), *available at* http://www.state.gov/s/ct/rls/fs/37191.htm.

16. *See* O'Brien, *supra* note 13, at 93-95.

17. Susan Sachs, *Hezbollah Offers a Helping Hand in Southern Lebanon*, N.Y. TIMES, May 31, 2000, at A3.

18. O'Brien, *supra* note 13, at 58.

19. CNN.COM, *Hezbollah: Violence mixed with social mission*, July 17, 2006, http://www.cnn.com/2006/WORLD/meast/07/13/hezbollah/index.html.

20. ELY KARMON, WASH. INST. FOR NEAR EAST POL'Y, 'FIGHT ON ALL FRONTS': HIZBALLAH, THE WAR ON TERROR, AND THE WAR IN IRAQ 4-11, Policy Focus No. 45 (Dec. 2003).

Following the end of Lebanon's civil war in 1989, Hezbollah was permitted to keep its arms under the Taif Accord in order to continue fighting the Israeli occupation of southern Lebanon.[21] During the 1990s, Hezbollah's leader, Sheikh Sayyed Hassan Nasrallah, developed the organization into a more effective fighting force with international reach.[22] Under his leadership, Hezbollah's network has conducted attacks or operations in Saudi Arabia, South America, Canada, Sweden, and several Asian States.[23] These attacks are closely linked to Iran.[24]

In spite of Israel's withdrawal from southern Lebanon in 2000, Hezbollah retained its militant wing.[25] In fact, they stockpiled thousands of medium and long range rockets and missiles, and continued lending operational support to the Palestinian intifada.[26] Hezbollah claims it cannot disarm since it is responsible for preventing further attacks by Israel.[27]

Today, the Lebanese government refuses to seize Hezbollah's assets or arms despite U.S. pressure, claiming they are a legitimate resistance movement and political party.[28] This unwillingness to disarm is in direct contravention of U.N. Security Council Resolution 1559.[29]

The July War of 2006, initiated by Hezbollah against Israel, demonstrated Hezbollah's current political and military strength. First, it was evident that, while smaller in size, Hezbollah is a formidable force against stronger adversaries, including the Israeli Defense Forces (IDF).[30] Second, it showed that Lebanon does not have the military strength or political capital to reign in Hezbollah if it truly wanted to.[31] Finally, Hezbollah enjoys unwavering popular support from large parts of Lebanon, particularly the Lebanese Shi'a community.[32]

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21. ANDREW EXUM, WASH. INST. FOR NEAR EAST POL'Y, HIZBALLAH AT WAR: A MILITARY ASSESSMENT 2, Policy Focus No. 63 (Dec. 2006) [hereinafter HIZBALLAH AT WAR].

22. *See id.*

23. KARMON, *supra* note 20, at 9-11. Hezbollah was responsible for the terror attacks in Buenos Aires in 1992 and 1994 and the bombing of the Khobar Towers in Saudi Arabia in 1996, which housed a U.S. military complex. Hezbollah's international operations also extend to the "tri-border area", where Argentina, Brazil, and Paraguay share a border. Also, Hezbollah cells in Colombia are known to use drug trafficking and contraband networks to launder funds later used to finance terrorism. *Id.* at 2, 9-10. *See also* SHULTZ, TIER ONE, *supra* note 5, at 59-61.

24. Matthew Levitt, Lecture at the Washington Institute for Near East Policy: Iran and Syria: State Sponsorship in the Age of Terror Networks (Mar. 7, 2005) (transcript available at the website of the Wash. Inst. for Near East Policy., http://www.washingtoninstitute.org/templateC07.php?CID=230.).

25. HIZBALLAH AT WAR, *supra* note 21, at 2.

26. *See* KARMON, *supra* note 20, at 24.

27. Graham E. Fuller, *The Hizballah-Iran Connection: Model for Sunni Resistance*, 30 WASH. Q. 139, 144 (Winter 2006-2007). Hezbollah also claims that its military wing is necessary to liberate the small territory known as Shebaa Farms, which is occupied by Israel, recognized as Syrian, but claimed by Lebanon. *Id.*

28. KARMON, *supra* note 20, at 23.

29. S.C. Res. 1559, ¶ 3, U.N. Doc. S/RES/1559 (Sept. 2, 2004).

30. *See* HIZBALLAH AT WAR, *supra* note 21, at 5.

31. *Id.* at 8.

32. Hussein Dakroub, *Hezbollah allies claim win in Lebanon,* ASSOCIATED PRESS, June 6, 2005.

The strength of Hezbollah's political wing should not be underestimated. In June of 2005, Hezbollah won all 23 seats available in Parliament for the southern portion of Lebanon.[33] As a result, Hezbollah has gained some legitimacy in the international community. While some States categorize Hezbollah as a terrorist organization (U.S. and Australia), others, at least partially, recognize the political wing (U.K.).[34] To date, the United Nations and the European Union have also not designated Hezbollah as a terrorist organization.[35]

Hezbollah's political power is a direct threat to the established Lebanese government. If it were to continue its social services in the South and limit its actions to those of a traditional political party, there would be little concern. However, Hezbollah's motives have never been so benign. Although peaceful, the protests held in Beirut in December 2006 were a precursor to what could be more coercive means to remove Prime Minister Siniora's government.[36] In fact, Hezbollah and its political allies continue to demand a greater voice in Siniora's cabinet.[37] Some claim the political standoff is partly a remnant of sectarian divisions unresolved since the civil war,[38] and partly a result of pro-U.S. officials (Siniora) pitted against pro-Iranian and Syrian groups (Hezbollah).[39]

The recent moves by Hezbollah to seize more control in Beirut must be viewed in light of Iranian support. Martin Kramer, adding to a quote from Richard Armitage, stated, "If Hezbollah is the A-team [of terrorism], Iran is the team owner and Syria is the coach."[40] Iran offers a full range of support to Hezbollah, including political, economic, and military assistance.[41] The relationship between the two could not be more clear. At a meeting with Iranian Supreme Leader Khamenei in 2001, Nasrallah publicly kissed Khamenei's hand – a sign among Shi'a Muslims that Nasrallah accepts Khamenei as his leader.[42]

Without Iran's financial and military assistance, Hezbollah would not be the organization it is today. Iran provides Hezbollah with at least $100 million per year,[43] and has also provided approximately 11,000 rockets to their arsenal.[44]

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33. *Id.*

34. Nigel Brew, Def. and Trade Group, Foreign Affairs, *Hezbollah in Profile*, Parliament of Australia, Research Note no. 42 2002-03, June 2, 2003, http://www.aph.gov.au/Library/Pubs/rn/2002-03/03rn42.htm.

35. *Id.*

36. Anthony Shadid, *Protest Crowds Surge as Beirut Braces for Next Step*, WASH. POST, Dec. 11, 2006, at A13.

37. *Id.*

38. Tensions between Sunni and Shia in Lebanon were relatively calm until the assassination of former Prime Minister Rafiq Hariri, a respected Sunni leader. Sunni's blame one of Hezbollah's key sponsors, Syria, for the killing. *See* Ghosh, *supra* note 2.

39. Shadid, *supra* note 36.

40. KARMON, *supra* note 20, at 49 (citing Martin Kramer, Remarks at the Woodrow Wilson International Center for Scholars Conference: The Terrorism of Hizbollah: Ideology, Scope, Threat (Jan. 16, 2003)).

41. KARMON, *supra* note 20, at 17.

42. Mehdi Khalaji, WASH. INST. FOR NEAR EAST POL'Y, *Iran's Shadow Government in Lebanon*, PolicyWatch No. 1124 (July 19, 2006) [hereinafter *Iran's Shadow Government*].

43. David Makovsky, *Iran's Hand in Lebanon*, SAN DIEGO UNION TRIB., July 23, 2006, at G-1.

Beyond merely giving arms and equipment, Iran provides the expertise of its special forces. Since Hezbollah's founding, its members have conducted regular training exercises with the Iranian Revolutionary Guard Corps (IRGC).[45]

Conversely, Hezbollah's achievements have helped strengthen the hardliners in Iran who actively engage in anti-U.S. and anti-Israeli policies.[46] The 2000 Israeli withdrawal from southern Lebanon and the de facto victory of Hezbollah in the July War of 2006 have emboldened Tehran.[47] Analysts agree that Iran pushed for Hezbollah and Hamas to instigate a confrontation with Israel in 2006 in order to draw attention away from increased international pressure on their nuclear ambitions.[48] Even the former Hezbollah Secretary General, Sheik Sobhi Tufeili, claims Hezbollah has now become a pawn to Iran.[49]

Iran's use of Hezbollah as an extension of its foreign policy allows a great deal of strategic flexibility. This is due, in large part, to Hezbollah's ability to ignore international law with relative impunity. Hezbollah regularly engages in terrorism, criminal enterprises, and violates the laws of war.[50] Furthermore, Hezbollah directly violates the mandate of U.N. Security Council Resolution 1559 by maintaining its militant wing. This resolution calls for the removal of all foreign troops from Lebanon and disarmament of all militia.[51] Resolution 1559 has had little influence over the status of Hezbollah's arms and has done nothing to stop outside support from both Syria and Iran.[52]

This unwavering support translates into political capital for Hezbollah. Flexing its political muscle, Hezbollah influenced the Siniora government after the Cedar Revolution of 2004, which effectively ousted Syrian troops from Lebanese soil. Shortly after the Cedar Revolution, Hassan Nasrallah arranged for three of his party members to be part of the Siniora cabinet, all while Hezbollah kept its strategic relationship with Syria.[53] Over the next six months, politicians and journalists who supported the Cedar Revolution were assassinated via car bombs.[54] Analysts believe this was to demonstrate to the anti-Syrian politicians in Lebanon that there would be no obstructing Iranian-Syrian assistance to Hezbollah.[55] This

44. *Id.*

45. *Id.*

46. KARMON, *supra* note 20, at 17.

47. Posting by Walid Phares to Counterterrorism Blog, *Hizbollah's Iranian War in Lebanon*, http://counterterrorismblog.org/2006/07/hizbollahs_iranian_war_in_leba.php (July 22, 2006, 01:50 PM).

48. *Id. See also* Makovsky, *supra* note 43.

49. Steve Schippert, *Iran Fueling Hamas and Hizballah Toward Conflict*, THREATSWATCH.ORG, Dec. 8, 2006, http://inbrief.threatswatch.org/2006/12/iran-fueling-hamas-and-hizball/.

50. KARMON, *supra* note 20, at 17.

51. S.C. Res. 1559, ¶¶ 2-3, U.N. Doc. S/RES/1559 (Sept. 2, 2004). *See also* Adel Darwish, *Hezbullah and Israel: The Proxy War*, MIDEASTNEWS, July 2006, http://www.mideastnews.com/Lebanon06july.html.

52. Phares, *supra* note 47.

53. *Id.*

54. *Id.*

55. *Id.*

terror seemingly persuaded the Lebanese government to not implement the measures in Resolution 1559.[56]

At least one analyst is more concerned with the political and ideological ties between Hezbollah and Iran than with disbanding Hezbollah's military wing.[57] It is believed that only total severance with Iran will eliminate Iran's use of Hezbollah as a threat to the region. Severing these ties, however, will prove difficult because, in the war of ideas, Hezbollah and Iran clearly have the initiative in Lebanon.

Ironically, Hezbollah's and Iran's popularity in Lebanon is due more to the public services they provide than to their collective military strength.[58] This stems from the early 1980s, when Iran first helped Hezbollah build broadcasting, healthcare, and educational centers. Iran also founded several hospitals and charitable organizations in southern Lebanon, which work closely with Hezbollah. With Iran's support, Hezbollah is able to provide for the basic needs of the people where the Lebanese government cannot.[59]

Iran is careful to cultivate future relationships as well. Every year hundreds of Hezbollah affiliated Lebanese students attend political and religious training at Iranian universities and seminaries.[60] The faithful Shi'a in Lebanon also have close ties to Iran. While Ali Hussein al-Sistani is respected as the most important ayatollah in Shi'a Islam, his presence in Lebanon is limited since he is based in the holy city of An Najaf, Iraq. In contrast, Iran receives religious taxes from Lebanese Shiites, and it pays monthly salaries to the Shiite clerics of Lebanon, thereby securing their loyalty.[61]

In addition, Iran is responsible, financially and materially, for a new Shi'a strength in the region.[62] Following the U.S. invasion of Iraq in 2003, Iran, Syria, and Hezbollah were able to rely on their close Shi'a ties in the region as a counter weight to U.S. policy in the region. In fact, many Shi'a organizations in Iraq already had financial and operational ties to Hezbollah prior to the U.S. invasion.[63] Several years later, after Hezbollah's impressive tactical and strategic successes in the July War of 2006, many fear that other groups, particularly the Iraqi militias, will emulate Hezbollah.[64] In fact, Muqtada al-Sadr, radical Shi'a cleric and leader of Mahdi's Army in Iraq, publicly supported Hezbollah during this conflict, and

56. *Id.*
57. *Iran's Shadow Government*, *supra* note 42.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Ghosh, *supra* note 2.
63. *See* KARMON, *supra* note 20, at 33.
64. Andrew Exum, WASH. INST. FOR NEAR EAST POL'Y, *Comparing and Contrasting Hizballah and Iraq's Militias*, PolicyWatch No. 1197 (Feb. 14, 2007), http://www.washingtoninstitute.org/templateC05.php?CID=2566.

members of the Mahdi Army have allegedly accepted training from Hezbollah in Lebanon and Iraq.[65]

C. Iraqi Insurgent Groups: Mahdi's Army & Badr Organization

Iran's support of non-state armed groups profoundly impacts the ongoing conflict in Iraq. Groups such as Mahdi's Army and the Badr Organization not only enjoy public support among disenfranchised Shi'a, but also maintain strong militant forces to combat coalition forces and Sunni insurgents. Each group holds key positions in the current Iraqi government, led by Prime Minister Nouri al Maliki. Similar to Iran's support of Hezbollah, these organizations operate with relative impunity, which allows Iran to use them to pursue its strategic objectives at a safe distance from the law.

The Iraqi insurgent groups most favored by Iran are Mahdi's Army and the Badr Organization. Mahdi's Army was formed in the summer of 2003 and is comprised of the armed followers of the cleric Moqtada al-Sadr.[66] Currently, it is estimated that its forces are at least several thousand strong.[67] At al-Sadr's direction, Mahdi's Army commits acts of terrorism and targets U.S., U.K., and Iraqi forces.[68] The fiercest outright clashes between coalition forces and Mahdi's Army came in April and August 2004.[69] The Badr Brigade – later renamed the Badr Organization – was founded in 1982 as the armed wing of the Supreme Council for Islamic Revolution in Iraq (SCIRI), which was established by Iran to oppose Saddam Hussein's regime.[70]

Unquestionably, the Iraqi insurgent groups are known violators of the laws of war. During the standoff with coalition forces in An Najaf in August 2004, al-Sadr and Mahdi's Army took up fighting positions in and around one of Shi'a Islam's holiest sites, the Imam Ali mosque.[71] This is a clear violation of international humanitarian law.[72] More recently, U.S. and Iraqi forces arrested the deputy health minister, who is a key member of al-Sadr's Mahdi's Army. He is accused of aiding militiamen and moving weapons in ambulances.[73] Perhaps most egregious is the ethnic cleansing committed by the "death squads" of both Mahdi's Army and the Badr Corps. Radical Shi'a elements in the region applaud al-Sadr's

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65. *Id.* at 2.

66. *See* GLOBALSECURITY.ORG, *Al-Mahdi Army / Active Religious Seminary / Al-Sadr's Group*, http://www.globalsecurity.org/military/world/para/al-sadr.htm.

67. MIPT Terrorism Knowledge Base, *Mahdi Army*, http://www.tkb.org/Group.jsp?groupID=4437.

68. GLOBALSECURITY.ORG, *supra* note 66.

69. *See id.*

70. KARMON, *supra* note 20, at 33. *See also* IRAN FOCUS, *Iran is Behind Badr Brigade in Iraq*, Nov. 17, 2005, http://www.iranfocus.com/modules/news/article.php?storyid=4461.

71. CNN.COM, *Who is Muqtada al-Sadr?*, Aug. 13, 2004, http://edition.cnn.com/2004/WORLD/meast/08/13/iraq.alsadr/.

72. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* 73, HRW Index No. 1564322939, Dec. 2003.

73. BBCNEWS, *Top Iraqi Official Held in Raid*, Feb. 8, 2007, http://news.bbc.co.uk/2/hi/middle_east/6341321.stm.

role in the sectarian conflict in Iraq, where his militia is likely responsible for thousands of Sunni deaths.[74]

Al-Sadr's political strength is derived from his popular support among the poor Shi'a in Iraq. Al Sadr's family successfully portrays itself as doing the most to redress decades of suppression by Sunni muslims under Saddam Hussein's rule.[75] Mahdi's Army wins support in places like Sadr City, a slum in northeast Baghdad of about two million people. In addition to protection against Sunni insurgents, they provide basic necessities such as cooking gas, and services like fixing drains.[76] Al-Sadr spends significant resources, donations from his followers, on orphans and poor families.[77] In addition, he has established a network of social institutions since the fall of Saddam Hussein's regime.[78] Controlling both the Health and Transportation Ministries facilitates al-Sadr's legitimate support for his social endeavors.[79] As a result, Sadr City has become a State within a State, not unlike Hezbollah's influence in southern Lebanon.[80]

Today, al-Sadr enjoys considerable political cover. Previous attempts by coalition forces to target al-Sadr and his Mahdi's Army have been stifled by Prime Minister Nuri al-Maliki.[81] In fact, Prime Minister Maliki owes his position to the swing votes of al-Sadr loyalists in the parliament.[82]

Politics have become the favored refuge of Mahdi's Army. It is characteristic of its members to lie low and return to politics so as not to incur the full wrath of the coalition. In late January 2007, following President Bush's announcement of the coalition "surge,"[83] they did just that. The 30 parliamentary members of the Sadr bloc returned to politics after a two month boycott.[84] Many believed this was to avoid the brunt of the U.S. "surge," while others think al-Sadr is building more leverage in anticipation of political pressure on his movement.[85] Al-Sadr himself,

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74. Ghosh, *supra* note 2.

75. GLOBALSECURITY.ORG, *supra* note 66.

76. Andrew North, *US Seeking Support in Sadr City*, BBCNEWS, Mar. 7, 2007, http://news.bbc.co.uk/2/hi/middle_east/6425171.stm.

77. Michel Nawfal, *Iran and Muqtada al-Sadr's Movement – Driving the Americans Into a Corner in Iraq*, BEIRUT AL-MUSTAQBAL, Apr. 10, 2004 (Open Source Center trans., on file with author).

78. *Id.*

79. Jeffrey Bartholet, *How Al-Sadr May Control U.S. Fate in Iraq*, NEWSWEEK, Dec. 4, 2006, *available at* http://www.msnbc.msn.com/id/15898064/site/newsweek/print/1/displaymode/1098.

80. North, *supra* note 76.

81. *Id.*

82. Bartholet, *supra* note 79.

83. *See* President George W. Bush, Address to the Nation (Jan. 10, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html [hereinafter President's Address].

84. CNN.com, *25 U.S. troops die on one of deadliest days in Iraq*, Jan. 21, 2007, http://www.cnn.com/2007/WORLD/meast/01/21/Iraq.main/index.html.

85. *See* Mike Wooldridge, *New Pressure on Mehdi Army*, BBCNEWS, Jan. 24, 2007, http://news.bbc.co.uk/2/hi/middle_east/6296097.stm.

however, remains out of the political sphere so he can develop his two-front strategy: develop his militia while his followers operate in politics.

Iran's support for Shi'a militias was clear in the early stages of the Iraq conflict. Ayatollah Ali Hossein Khamenei declared on April 11, 2003, that Iran would not "remain neutral between the Iraqi people and the occupiers."[86] Primarily, Iranian ambitions in Iraq are to protect and promote the interests of the Shi'a, and frustrate the efforts of the U.S.-led coalition.[87] In spite of the Persian-Arab divide, Iranian ties to Iraqi Shi'a opposition dates back to the founding of the SCIRI's militant wing, the Badr Organization, in 1982.[88]

As early as April 2004, Iranian diplomatic sources stated that "certain Iranian circles wish to push the United States into an Iraqi corner to avert any serious U.S. challenge to Iran in the near future, which is a normal thing to do." [89] The same source responded to a question about Tehran's link to al-Sadr's group: "The United States came to Iraq [to put pressure on Iran].... For its part, Iran wishes to see the United States driven into a corner in Iraq." [90] Al Sadr's movement is a relative unknown to the U.S. in comparison to other groups in the Iraqi government, both politically and militarily. It is a "hidden force."[91] Al-Sadr claimed that if Iran were attacked by the United States, then Mahdi's Army would come to its defense. Al-Sadr made this announcement from Tehran in 2006.[92]

There is little doubt that Iran supplies arms and ammunition to Shi'a militias and is committed to seeing the United States fail in Iraq.[93] Iran provides the Mahdi's Army and the Badr Organization with weapons, mortar shells, and rocket propelled grenade (RPG) rounds.[94] British intelligence suggests that the Sadr-led uprising in Najaf, Basra, and other southern Iraqi cities in 2004 was financed by Iran.[95] Iran once relied exclusively upon the Badr Organization in Iraq, but with recent support to Mahdi's Army it is uncertain whether this has changed.[96] Nonetheless, it is clear that the Badr Organization at one point received operational and financial support from the Iranian Revolutionary Guard Corps in the sum of $3 million per month.[97] In contrast, a Mahdi's Army commander stated that Iran's help is given to al-Sadr's militia, not because they like them, "but because they

86. KARMON, *supra* note 20, at 38.

87. Robert Baer, *Where's the Smoking Gun on Iran?*, TIME.COM, Feb. 13, 2007, http://www.time.com/time/world/article/0,8599,1588810,00.html [hereinafter *Where's the Smoking Gun on Iran?*].

88. KARMON, *supra* note 20, at 33. *See also* IRAN FOCUS, *supra* note 70.

89. Nawfal, *supra* note 77.

90. *Id.*

91. *Id.*

92. Ghaith Abdul-Ahad, *'If they pay we kill them anyway' – the Kidnapper's Story*, THE GUARDIAN (London), Jan. 27, 2007, at 1.

93. *Where's the Smoking Gun on Iran?*, *supra* note 87.

94. Abdul-Ahad, *supra* note 92.

95. MIPT Terrorism Knowledge Base, *Mahdi Army*, *supra* note 67.

96. *See* Abdul-Ahad, *supra* note 92.

97. *IRAN FOCUS*, *supra* note 70.

hate the U.S." [98] While Iran supports both organizations, they remain rival groups.[99]

In early 2007, the U.S. government took a rare step and openly accused Iran of providing highly effective roadside bombs to Iraq's militia. It was reported that the Badr Brigade and Mahdi's Army received and used Explosively Formed Penetrators (EFPs) and killed about 1780 coalition troops from 2005 to 2006.[100] Insurgents also received training on how to implement EFPs in Iranian territory.[101] While Iran is generally charged with providing these weapons, the level of Tehran's direct involvement is unclear. Former U.S. Joint Chiefs of Staff Chairman General Peter Pace said that these roadside bombs are linked to Iran, but it is unclear whether top government officials are aware or complicit.[102]

Because it is given indirectly, Iranian support to Iraq's militia is hard to detect. American forces arrested and have been holding five IRGC members since January 11, 2007.[103] They claim these five helped the Iraqi opposition target Americans. However, there is no direct evidence of attacks by the IRGC, largely because this evidence is so hard to come by.[104] This fits Iran's policy of indirect engagement through non-state armed groups.

Current reports are uncertain as to how deep Iran's connection to Mahdi's Army is, besides funding and supplying weapons.[105] What is clear, however, is that Al Sadr and his militia find sanctuary in Iran. After President Bush announced the security crackdown in Baghdad[106] – or the "surge" – senior Mahdi Army officials fled to either Syria or Iran.[107] Also, Sadr headquarters warned their supporters to avoid confrontation with the Americans at all cost.[108] A senior advisor to Prime Minister Maliki confirmed that al-Sadr was in Iran.[109] This would not be the first time al-Sadr has met with the hardline Shi'a clerics in

98. Abdul-Ahad, *supra* note 92.

99. Bartholet, *supra* note 79.

100. Sharon Behn, *'Rogue' Shi'ite Militias Using Iranian Bombs*, WASH. TIMES, Feb. 18, 2007, at A5. *See also* Michael R. Gordon, *Deadliest Bomb in Iraq is Made by Iran, U.S. Says*, N.Y. TIMES, Feb. 10, 2007, at A1; BBCNEWS, *US accuses Iran over Iraq Bombs*, Feb. 11, 2007, http://news.bbc.co.uk/2/hi/middle_east/6351257.stm; CNN.COM, *Gates: U.S. Has Evidence of Iran Helping Insurgents*, Feb. 9, 2007, http://www.cnn.com/2007/POLITICS/02/09/gates.iraq.iran.ap/index.html.

101. Jaime McIntyre, *Iraqi Insurgents Being Trained in Iran, U.S. Says*, CNN.COM, Apr. 12, 2007, http://www.cnn.com/2007/WORLD/meast/04/11/iraq.main/index.html.

102. CNN.COM, *Top General Casts Doubt on Tehran's Link to Iraq Militias*, Feb. 14, 2007, http://www.cnn.com/2007/WORLD/meast/02/13/pace.iran/ [hereinafter *Top General Casts Doubt*].

103. Robert Baer, *Are the Iranians Out For Revenge?*, TIME.COM, Jan. 30, 2007, http://www.time.com/time/world/article/0,8599,1583523,00.html.

104. *See Where's the Smoking Gun on Iran?*, *supra* note 87.

105. *See* Abdul-Ahad, *supra* note 92.

106. President's Address 2007, *supra* note 83.

107. Joshua Partlow & Ernesto Londero, *Lie Low, Fighters are Told; 'Try at All Costs' to Avoid Conflict with Americans*, WASH. POST, Feb. 1, 2007, at A10.

108. *Id.*

109. BBCNEWS, *Radical Shia Cleric 'is in Iran'*, Feb. 15, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6364193.stm.

Iran.[110]

Iran's support of non-state armed groups is not limited to religious affiliation. It also supports groups that share its strategic interests. The following section discusses one such non-Shi'a group that Iran supports – Hamas.

D. Hamas: Decades of Violence & A Political Coup

Hamas was founded in the 1960s as an outgrowth of the Muslim Brotherhood.[111] Its founder, Sheikh Ahmed Yassin, started the group with non-violent practices, but he took the group in a more radical, violent direction in the early 1980s.[112] The Charter of Hamas, released in 1988, leaves no doubt about its goals, including: dedication to creating an Islamic state in Palestinian territory, which includes all of modern Israel and the Palestine territories. This necessarily involves the destruction of Israel through violent jihad, the duty of all Muslims.[113]

Hamas frequently uses suicide bombs and rocket attacks to attack civilians and is violently opposed to a peaceful settlement with Israel. However, popular support for Hamas is substantial. Armed with significant outside financial support, the group provides extensive networks of social services in the Palestinian Territories.[114]

The political wing of Hamas won a significant victory in January 2006. In the parliamentary elections, Hamas won 76 of the 132 seats.[115] In spite of the electoral victory, Hamas continues its aggressive position toward Israel.

In the fall of 2006, Hamas was engaged in a violent power struggle with its more moderate rival group, al-Fatah.[116] A power-sharing agreement resulted from a conference in Mecca. Again, Hamas emerged the victor.[117] The organization will essentially maintain its foothold over the security force run by Hamas in Gaza, as well as key political appointees.[118] Therefore, both its military and political wings remain strong.

There is ample evidence that Iran now directly supports Hamas.[119] Iran has sponsored three conferences relating to support for the second Palestinian Intifada, in 2001, 2002, and 2006.[120] More recently, in December 2006, Prime Minister Ismail Haniyeh (Hamas) was in Tehran meeting with President Mahmoud

110. *See* Rowan Scarborough, *Iran, Hezbollah Support al-Sadr*, WASH. TIMES, Apr. 7, 2004, at A1.

111. MIPT Terrorism Knowledge Base, *Hamas*, http://www.tkb.org/Group.jsp?groupID=49.

112. *Id.*

113. *See* The Covenant of the Islamic Resistance Movement, pmbl., intro., arts. 6-7, 11, 13, 15, 33, Aug. 18, 1988, *available at* http://www.yale.edu/lawweb/avalon/mideast/hamas.htm.

114. MIPT Terrorism Knowledge Base, Hamas, *supra* note 111.

115. *Id.*

116. *Id.*

117. *See* Tim McGirk, *Hamas Gets the Upper Hand*, TIME.COM, Feb. 15, 2007, http://www.time.com/time/world/article/0,8599,1590431,00.html.

118. *See id.*

119. Makovsky, *supra* note 43.

120. Bill Samii, *Iran: Intifada Conference in Tehran Has Multiple Objectives*, RADIO FREE EUROPE, Apr. 14, 2006, http://www.rferl.org/featuresarticle/2006/04/a6170638-c079-4af1-b441-75dbba236340.html.

Ahmadinejad. Haniyeh pledged to continue Hamas' violent jihad and refused to recognize "the Zionist entity" in spite of international pressure to do so.[121]

After Hamas won the January 2006 parliamentary elections, the West set out to isolate the Hamas government by cutting off financial support.[122] Iran quickly offered to step in and give financial assistance where the United States and the European Union left off.[123] So far, Iran has given the government at least $120 million in aid since the West cut off financial ties.[124] Iran intends to invest $250 million more in order to upgrade the organization's political and military capabilities.[125] As the primary supporter of the Hamas government, Iran now has stronger influence over its political and operational elements.

Military aid is given to Hamas in the form of new technology, training, and equipment.[126] Iran provides tons of explosives, small arms, and millions of rounds of ammunition and advanced anti-tank rockets.[127] Under the recently agreed military arrangement, Iran is also setting up a logistics system for Hamas to help properly maintain and produce weapons.[128] The aim is to make Hamas as effective a fighting force as Hezbollah.[129]

Training of Hamas militants occurs in both the Palestinian Territories and Iran. According to one report, Iranian agents, including a General Officer, were arrested in Gaza at an Islamic university known to be a Hamas stronghold. The agents were actively training Hamas activists to make explosives in chemical labs.[130] Groups of fighters from Gaza also receive training in Syria and Iran at IRGC bases.[131]

Hamas and Iran have reciprocal ties. In 2005, Hamas Chief Khaled Mashaal vowed that if Iran were attacked by Israel, Hamas would step up attacks. He added that President Ahmadinejad is courageous for dismissing the holocaust and calling for Israel to be transplanted to Europe or North America.[132] An Israeli newspaper

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121. Schippert, *supra* note 49.

122. BBCNEWS, *Iran Offers Hamas Financial Aid*, Feb. 22, 2006, http://news.bbc.co.uk/2/hi/middle_east/4739900.stm.

123. *Id.*

124. Richard Boudreaux, *Israeli Official Says Iran Training Hamas*, L.A. TIMES, Mar. 6, 2007, at 7.

125. TEL AVIV YEDI'OT AHARONOT, *Israel: Secret Iran-Hamas Agreement to Improve Military Capabilities*, Dec. 2, 2006, at 2 [hereinafter *Secret Iran-Hamas Agreement*].

126. ASSOCIATED PRESS, *Galant Outlines Hamas-Iran Ties*, JERUSALEM POST, Mar. 7, 2007, *available at* http://www.jpost.com/servlet/Satellite?cid=1173173954784&pagename=JPost%2FJPArticle%2FShowFull. *See also* Boudreaux, *supra* note 124.

127. Schippert, *supra* note 49.

128. *See Secret Iran-Hamas Agreement*, *supra* note 125.

129. *See id.*

130. Ali Waked, *Iranian General Supervised Hamas Arms, Source Says*, YNETNEWS.COM, Feb. 2, 2007, http://www.ynetnews.com/articles/0,7340,L-3360122,00.html. During this raid a Hamas commander responsible for orchestrating the kidnapping of an Israeli soldier near the Gaza Strip last June – one of the precipitating moves to the July War of 2006 – suffered injuries. *Id.*

131. *Secret Iran-Hamas Agreement*, *supra* note 125.

132. Posting by Robert Spencer to Jihad Watch, *Hamas Vows Revenge if Iran Attacked*,

reports that, "In effect, the Iran-Hamas agreement constitutes the final and decisive phase of enlisting Hamas into the broad rejectionist front that Iran is seeking to establish – a front that already includes Lebanon, Syria, and elements in Iraq."[133]

III. IRANIAN OBJECTIVES & TACTICS

Many misinterpret Iran's strategy of using non-state armed groups for erratic behavior, or "rogue" tendencies. In reality, Iran has a very clear strategic objective in using non-state armed groups to foment instability, politically and militarily, in target States.[134] Iran's non-state armed groups' influence is no longer limited to specific regions; it is now a global threat. While some groups appear to have divergent interests, each serves Iran's overall policy objectives.[135] This section reveals that Iran's goals may be similar to other State supporters of insurgent groups; namely, regional influence and strategic competition,[136] but their tactics are more sophisticated.

A. Regional Hegemony & Beyond

Iran's goals are clear: increasing Iranian influence in the Middle East while limiting Sunni Arab influence, destroying Israel, and limiting or eliminating U.S. influence in the region. The U.S. unwittingly played into Iran's strategic plan by taking out its two principal rivals in the region – Saddam Hussein in Iraq, and the Taliban in Afghanistan. Strong allies in Syria and Hezbollah also contribute to Iran's newfound status in the region. Iran's efforts to go nuclear, if successful, would undoubtedly send shockwaves through the regional power structure as well.

Destroying Israel and establishing one State in Palestine remains a priority, and has been at least since the revolution in 1979.[137] Iranian support of Hamas, in spite of the Shi'a-Sunni divide, is a logical extension of this policy. President Mahmoud Ahmadinejad is vocal on this point. Shortly after taking office in 2005, he openly called for Israel to be "wiped off the map."[138] Following the start of the July War of 2006, the Iranian paper which most represents the supreme leader Ayatollah Seyyed Ali Hossayni Khamenei's voice, stated:

> Wiping out the Zionist regime is not only a religious and national duty but a humane one...[P]olitical, logistical and arms support for Hamas and Hezbollah and sending combatants to the front is the minimum cost that the Islamic countries must pay for safeguarding their security and independence.[139]

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http://www.jihadwatch.org/archives/009426.php (Dec. 15, 2005, 6:40 AM).

133. *Secret Iran-Hamas Agreement*, *supra* note 125.

134. DANIEL L. BYMAN ET AL., RAND CORP., IRAN'S SECURITY POLICY IN THE POST-REVOLUTIONARY ERA 8, MR-1320-OSD (2001).

135. O'Brien, *supra* note 13, at 59.

136. DANIEL L. BYMAN ET AL., RAND CORP., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENTS 23, MR-1405-OTI (2001) [hereinafter TRENDS IN OUTSIDE SUPPORT].

137. AL JAZEERA, *Ahmadinejad: Wipe Israel Off Map*, Oct. 28, 2005, http://english.aljazeera.net/English/archive/archive?ArchiveId=15816.

138. *Id.*

139. Makovsky, *supra* note 43.

In Iraq, support of the Shi'a majority, including SCIRI, the Badr Organization, and Mahdi's Army, is the easiest way to cripple U.S. policy objectives. As long as the United States is preoccupied with Iraq and Afghanistan, there is little chance that it poses a significant military threat to Iran. Furthermore, the Islamic Republic cannot be deaf to U.S. public opinion supporting a withdrawal of forces from Iraq. Critics of the Iraq war are skeptical of the administration's efforts to link Iran to the Iraqi militias, claiming it is the same type of hype used prior to the invasion of Iraq.[140]

Perhaps more disquieting than Iran's objectives are the methods it uses to achieve them. By undermining existing governments, Iran does not have to fire a single shot in order to gain regional influence, particularly in Lebanon and Iraq. Instead, it supports armed groups and their political wings which delegitimize target States, thereby securing Iranian interests.

B. The Sophisticated Nature of Iranian Support

The methods employed by Iranian-backed armed groups seem to reflect an unwelcome evolution in the use of insurgents. However, State sponsorship of non-state armed groups is not a new phenomenon. Prior to World War II, a proxy war was fought in Spain between Germany and the Soviet Union. Germany's fascist allies were led by General Franco, who battled the Soviet-backed Republicans in the Spanish Civil War.[141] Since 1946 there have been at least thirty-two cases of external participation by States in internal conflicts.[142] Another report estimates that from 1991-2000, State support played a significant role in forty-four insurgencies.[143]

Also, non-state armed groups achieved greater strategic and transnational capabilities as a result of U.S.–Soviet proxy conflicts during the Cold War.[144] In the post-Cold War era, transitional or declining States are breeding grounds of lawless, ungoverned areas ripe for control by armed groups.[145]

State support is not limited to specific geographic locations or to specific causes. Governments have supported groups in Asia, Africa, Europe and the Middle East.[146] The reasons behind State support include gaining regional influence, destabilizing neighbor States, payback, regime change, influencing the opposition, internal security, prestige, supporting co-religionists, supporting co-

140. *General Casts Doubt*, *supra* note 102.

141. Adel Darwish, *Hezbullah and Israel: The Proxy War*, MIDEASTNEWS.COM, July 2006, http://www.mideastnews.com/Lebanon06july.html. Darwish compares the Spanish Civil War to the July War of 2006 in Lebanon, where he argues that the United States did combat against Syrian and Iran through Israel and Hezbollah, respectively. *See id.*

142. Nils Petter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 J. PEACE RES. 615, 620 (2002). Version 4-2006 of the dataset is based on changes described in Lotta Harbom et al., *Armed Conflict and Peace Agreements*, 43 J. PEACE RES. 617, 617-31 (2006).

143. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 9.

144. O'Brien, *supra* note 13, at 29 (citing THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 43-46 (2004).

145. SHULTZ, TIER ONE, *supra* note 5, at 8. *See also* S.C. Res. 405, *supra* note 8.

146. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 17.

ethnics, irredentism, leftist ideology, and plunder.[147]

Hezbollah, the Iraqi insurgents, and Hamas all have strong militant wings, but their primary weapon against their host State is not the use of force. Not surprisingly, most datasets that track armed conflicts do not consider the type of support that Iran gives these groups either because a.) an open conflict resulting in casualties has not yet emerged, b.) Iran's military support is not direct and is therefore not taken into account, or c.) political and social support intended to undermine sitting governments is not considered. In fact, two separate datasets that track State support of insurgencies, the Uppsala Conflict Data Program and International Peace Research Institute, Oslo (UCDP/PRIO) dataset of 2006[148] and the Rand Report of 2001[149] focus on casualties and military effectiveness when States support rebel groups. A leading expert in non-state armed groups, Richard H. Shultz, also argues that despite political aspirations, armed groups will always be defined by their underlying militancy.[150] Iranian support may prove to be the exception to these standards, and it may be establishing an emerging norm.

Several aspects of Iranian-backed armed groups require closer examination to determine whether they are indeed breaking new ground. These include the creation of a State within a State, the non-violent infiltration of the political system, gaining public support by providing services and financial assistance, and training forces and maintaining an active intelligence branch. Many other State-supported armed groups share some of these traits with the Iranian-backed groups, but none combine them without the underlying threat of armed force to the target State.

First, both Hezbollah and Mahdi's Army have created a State within a State in Lebanon and Iraq, respectively. Hezbollah controls most of southern Lebanon, while Mahdi's Army controls Sadr City in Baghdad and poor, rural areas in southern Iraq. This aspect of their threat to the target State is not in itself unique. In Colombia, for example, approximately half of the State's territory has been abandoned by the government for decades and is controlled by multiple armed groups.[151] Similarly, in Nepal, Maoist rebels effectively control and run a parallel government from a large area of the State.[152]

The distinction between Hezbollah and Mahdi's Army, and the Colombian insurgents and Maoist Rebels is outside State support. While the Colombian insurgents receive minor support from Venezuela and Cuba,[153] this support is

147. *Id.* at 23-40.

148. *See generally* Harbom et al., *supra* note 142. For the dataset itself, *see* CENTRE FOR THE STUDY OF CIVIL WAR, PRIO, ARMED CONFLICTS VERSION 4-2006 (2006), http://new.prio.no/CSCW-Datasets/Data-on-Armed-Conflict/UppsalaPRIO-Armed-Conflicts-Dataset/Armed-Conflicts-Old-Versions/Armed-Conflicts-Version-4-2006/.

149. *See* TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 31.

150. *See* Shultz, *Armed Groups*, *supra* note 9, at 10.

151. SHULTZ, TIER ONE, *supra* note 5, at 9.

152. BBCNEWS, *Nepal Maoists disband government*, Jan. 18, 2007, http://news.bbc.co.uk/2/hi/south_asia/6273535.stm.

153. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 12.

limited and does not significantly affect the outcome of the conflict. There is no indication that the Maoist rebels receive any form of outside State support.[154]

Second, another key aspect of Iranian-backed armed groups is their political achievements. Hezbollah and Mahdi's Army succeeded in creating their parallel governments, in part, by earning seats in the sitting government's parliament. Similarly, the electoral victory for Hamas in January 2006 means that Hamas did not need to use force to take power in the Palestinian Territories – they won it through popular support. While the militant wings of each of these groups remains a large part of their operations, it is the legitimacy of their political wings and their ascension to power that most undermines many analysts' reliance on violence as the measuring stick for insurgent activity.

An historical analogy to a non-violent political takeover is the Anschluss of Austria by Germany in 1938. The Nuremberg Tribunal found that Nazi-leaders committed aggressive acts against Austria.[155] The annexation of Austria by Germany was committed "without the use of armed force: internal subversive actions and the immediate threat of extreme violence assured in these cases the 'peaceful co-operation' of the governments concerned."[156] Other insurgent groups with outside State support have similarly entered into, or taken over, a target State's political apparatus. Uganda and Rwanda's support of insurgents to overthrow the Mobutu regime in the Congo is an example.[157] The distinction between this case and Iranian-supported armed groups is that Hezbollah, Mahdi's Army, and Hamas did not win political support by threatening their respective governments with overwhelming force. Even though armed groups by their very nature do not follow democratic rules, they do seek to take full advantage of their adversaries who do.[158] By getting involved with, or actually taking over, the political apparatus of a State, the Iranian-backed armed groups benefit from legitimate power, which they can exercise through State institutions that are still intact – unlike the aftermath of a violent coup.

Third, Hezbollah, Hamas, and Mahdi's Army have all skillfully used much of their financial resources to fund vast socioeconomic networks, increasing their influence among the public.[159] This is perhaps the single most important aspect of the effectiveness of these groups, and the implementation of Iran's strategy. Other insurgent groups tend to exert their influence over local populations, raising money by collecting taxes or engaging in illicit criminal enterprises. Examples of these practices are groups such as Columbia's FARC, the Revolutionary United Front

154. MIPT Terrorism Knowledge Base, *Communist Party of Nepal-Maoist*, http://www.tkb.org/Group.jsp?groupID=3531.

155. Judgment, Trial of the Major War Criminals: Before the International Military Tribunal, Nuremberg, 1 I.M.T. 171, 186, 194, Nov. 14, 1945-Oct. 1, 1946.

156. DR. C.A. POMPE, AGGRESSIVE WAR AN INTERNATIONAL CRIME 21 (1953).

157. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 33. Other examples include Pakistan's support of the Taliban to topple the Rabbani government in Afghanistan and Russia ousting the United Tajik Opposition-led government in Tajikistan. *Id.*

158. SHULTZ, TIER ONE, *supra* note 5, at 13-14.

159. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 87.

(RUF) in Sierra Leone, Cambodia's Khmer Rouge, and the Turkish Kurdistan Worker's Party (PKK).[160] By nurturing public support, the Iranian-backed groups enlist the loyalties of the community, increasing cooperation with their efforts, and providing a ready supply of recruits for their cause. They are also ensured a territorial base of operations.

Fourth, the Iranian-backed armed groups benefit from the training and intelligence capabilities of the IRGC's Quds force. In particular, Tehran's forces turned Hezbollah into a formidable armed force with expert intelligence-gathering capabilities.[161] Hamas and Mahdi's Army will similarly benefit from recent cooperation with Iran's trainers. The Quds force was created in the early 1980s with the intent of carrying out Iran's foreign policy – which, at the time, included training the Badr Organization to carry out attacks against Iraq.[162] Today they continue to assist Iraqi insurgent groups gather and manipulate intelligence.[163] While other States certainly provide training to insurgents – Pakistan is a standout example[164] – it is uncertain whether the assistance, especially the intelligence aspect, is as widespread or effective as that offered by the IRGC. In fact, many insurgent groups act as sources of intelligence for their sponsor States.[165] Iran, on the other hand, provides specialized training to its sponsor groups in order to gather and manipulate intelligence for their independent operations.[166]

These four aspects of Iranian support highlight the sophisticated nature of its strategy. Even though these groups started as militant organizations, their militant wings do not play the dominant role in undermining their host State as in most insurgencies. A primary example of a force-based insurgency is the RUF in Sierra Leone, sponsored by Charles Taylor's former government in Liberia. The RUF was no more than an armed militia, plundering and pillaging at will, even though they tried to have a veneer of respect.[167] While not all state-sponsored insurgent groups are as rudimentary as this, none reach the same level of sophistication as Iranian-backed groups. This strategy allows Iran to avoid public scrutiny and, therefore, accountability for violations of international law.

IV. INDIRECT AGGRESSION, IRANIAN RESPONSIBILITY, & POLICY CONSIDERATIONS

Iranian support of non-state armed groups should be considered an act of aggression in violation of international law. In order to make this determination, it

160. *Id.*

161. *Id.* at 92. Hezbollah effectively established espionage rings to operate inside Israel after the withdrawal of the IDF from Lebanon in 2000. SHAUL SHAY, THE AXIS OF EVIL: IRAN, HIZBALLAH, AND PALESTINIAN TERROR 141-42 (2005).

162. RADIO FREE EUROPE, *Iran: Expert Discusses Iran's Quds Force and U.S. Charges Concerning Iraq*, Feb. 16, 2007, http://www.globalsecurity.org/wmd/library/news/iraq/2007/02/iraq-070216-rferl01.htm. In fact, the Iranian Quds force was active in Afghanistan in the 1980s, Iraq throughout the 1980s and '90s to undermine Saddam Hussein's regime, Bosnia in the early 1990s, and Sudan in the early 1990s. *Id.*

163. *Id.*

164. TRENDS IN OUTSIDE SUPPORT, *supra* note 136, at 92.

165. *Id.* at 98.

166. RADIO FREE EUROPE, *supra* note 162.

167. SHULTZ, TIER ONE, *supra* note 5, at 24.

is necessary to briefly discuss the history and modern legal norms governing the *jus ad bellum*.

A. Jus Ad Bellum & State Aggression Generally

The laws governing the initiation of armed conflict are considered the *jus ad bellum*.[168] This area of law has a rich history dating back to the early Christian and Islamic teachings, which became known as the "just war" theory.[169] During the twentieth century, *jus ad bellum* began to take shape through resolutions passed by the League of Nations[170] and the Kellogg-Briand Pact.[171] These treaties sought to prohibit the aggressive use of force between States in order to promote peace and security.[172]

Today, Article 2(4) of the U.N. Charter prohibits member States from using aggressive force as an extension of foreign policy. This provision states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[173]

The Security Council declared, for the first and only time, that a member committed aggression, or "a breach of the peace" as it were, when North Korea invaded South Korea in 1950.[174] Non-state armed groups can also commit aggression, as indicated in U.N. Security Council Resolution 405 of 1977.[175] Under Resolution 405, the Security Council used the term "aggression" with regard to mercenaries who attacked Benin in 1977, but did not name the State that sponsored the attack.[176]

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168. *See* Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT'L L. 905, 905 (2002). In contrast, the *jus in bello*, also known as international humanitarian law or the law of war, governs the methods used to conduct armed conflict. *See* BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 110-11 (2000).

169. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 11-16 (1993). *See also* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5 (1963); Charles Clinch, *Jihad: How it can save Just War Doctrine*, UCLA INT'L INST., http://www.international.ucla.edu/article.asp?parentid=35780.

170. See BROWNLIE, *supra* note 169, at 71-72, for a discussion of League Assembly resolutions relating to aggression.

171. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]. For an in depth discussion of the Kellogg-Briand Pact, *see generally* BROWNLIE, *supra* note 169, at 74-95. *See also* Steven R. Ratner, *Crimes Against Peace*, *in* CRIMES OF WAR BOOK 109 (Roy Gutman et al. eds. 1999), *available at* http://www.crimesofwar.org/thebook/crimes-against-peace.html.

172. Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 367-68 (1953).

173. U.N. Charter art. 2, para. 4.

174. S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950).

175. S.C. Res. 405, *supra* note 8.

176. Mohammed M. Gomaa, *The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*, *in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 55, 65 n. 32 (Mauro Politi & Giuseppe Nesi eds., 2004).

The General Assembly adopted Resolution 3314 (GA Res. 3314) in 1974 in order to assist the Security Council in determining when aggression is committed by States.[177] Aggression is defined in article 3 of GA Res. 3314 to include: invasion or attack of armed forces of a State into another State's territory, bombardment of another State's territory, blockades, an attack on the armed forces of another State, violating the terms of an agreement between two States when one State has agreed to allow the other's armed forces on its territory, and one State allowing another State to use its territory to launch an attack against a third State.[178] Most relevant to this discussion is article 3(g), which states that aggression is committed by:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[179]

While Iranian support of armed groups likely falls within this article, it is important to recognize the two distinct acts of "indirect aggression" seen in article 3(g).

First, there is the sending of irregular troops, or non-state armed groups, to another State.[180] The actions of these groups can be directly attributed to the State that sent them. This is a "form of direct aggression, in that the State is responsible for the hostile act, performed by its de facto military corps."[181] However, the armed group must commit acts comparable to the "direct use" of force by a State – both in terms of political independence and territorial integrity – in order for it to be considered aggression.[182]

Second, there is "substantial involvement," which includes: training, equipping, supplying weapons or other equipment, granting economic or financial aid, and making available or tolerating the use of a State's territory for operational or supply activities for the armed group.[183]

The International Court of Justice (ICJ) appears to identify with the first type of "indirect aggression." In the 1986 *Nicaragua v. United States* case, the ICJ stated that sending by a State of armed bands or groups is to be considered an armed attack by that State when these attacks are equivalent to a true armed attack performed by regular forces; the ICJ adds that mere supply of logistical support would not be considered an act of aggression justifying an armed response.[184] There must be "effective control" of the armed group for its actions to be

177. G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/9631/Annex (Dec. 14, 1974).

178. *Id.* ¶ 3.

179. *Id.* ¶ 3(g).

180. *Id.*

181. Umberto Leanza, *The Historical Background*, *in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 3, 7 (Mauro Politi & Giuseppe Nesi eds., 2004).

182. *Id.*

183. *Id.* at 7-8.

184. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 65 (June 27). For additional commentary, *see also* Leanza, *supra* note 181, at 8.

imputable to a State.[185] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) also considered State responsibility for non-state actors in the *Tadic* decision. The *Tadic* court required "overall control going beyond the mere financing and equipping of military operations," for there to be State responsibility.[186]

In addition to the "control" requirement, the ICJ accepted an "acknowledgment" basis for State responsibility in the 1980 case, *United States v. Iran*. In that case, the conduct of non-state actors, who took the American consular staff in Tehran hostage, was attributable to Iran because of the adoption of this conduct by the Khomeini government.[187] Both the "control" and "acknowledgement" basis for State responsibility have been adopted by the International Law Commission as customary international law.[188]

B. Does Iranian Support of Non-State Armed Groups Constitute Aggression?

Iran should be accountable for the unlawful acts of the armed groups it sponsors. It is unlikely, however, that the actions of these armed groups – with the exception of Hezbollah – are tantamount to State aggression. Under article 2(4) of the U.N. Charter and GA Res. 3314 it would seem that groups such as Hezbollah, Mahdi's Army, and Hamas threaten either the territorial integrity or the political independence of their host State or their neighbors with the direct and substantial support of Iran.[189] The fact that these actions are done in a manner that is not recognized as an unlawful action vis-à-vis a sovereign State is testament to Iran's exploitation of the rule of law.

Iran's use of Hezbollah and Hamas against Israel fulfills the definition of aggression under GA Res. 3314. Hezbollah in particular uses direct force against Israel that is equivalent to the direct use of force by a State. This was evident in the organization's acts during the July War of 2006.[190] Hezbollah and Hamas each committed raids that involved the murder and kidnapping of Israeli Soldiers to start the conflict.[191] This occurred with Iranian backing.[192] Iran may, therefore, be responsible for violating the territorial integrity of Israel by killing and kidnapping IDF Soldiers on Israeli territory and through Hezbollah's launching of Iranian-supplied rockets into Israel.[193] Hezbollah, while somewhat autonomous, would not be the military and political force it is today without Iran's support. Moreover, Iran may be responsible for Hezbollah and Hamas's aggressive acts toward Israel

185. Military and Paramilitary Activities, 1986 I.C.J. at 65.

186. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 145 (July 15, 1999).

187. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 35 (May 24).

188. G.A. Res. 56/83, ¶ 8, 11, Annex, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001).

189. U.N. Charter, *supra* note 174; G.A. Res. 3314 (XXIX), *supra* note 177, ¶ 3(g).

190. Phares, *supra* note 47.

191. *Id.*

192. *Id. See also* Makovsky, *supra* note 43.

193. There are two separate groups of rocket attacks to consider. First, those that came before the murder and kidnapping of IDF soldiers and can be interpreted as part of the initial armed aggression. Launching the rockets into civilian centers, particularly Haifa, entails a different form of responsibility than actually initiating the conflict. These would be analyzed under the *jus in bello*.

by acknowledging its efforts and reaffirming the goal of "elimination of the Zionist regime."[194]

Iran may also be committing aggression against Lebanon by threatening its political independence. It is alleged that Hezbollah assassinated political supporters of the Cedars Revolution with car bombs.[195] If true, this can only be interpreted as a direct use of force intended to threaten the Lebanese government.[196] Prime Minister Siniora has since refused to force Hezbollah to disarm under the provisions of Security Council Resolution 1559. This leaves Hezbollah's militant wing as the de facto armed force in Lebanon – the strength of which is a result of Iranian weapons supplies. With twenty-six seats in Parliament and total control over the public services and social structures in southern Lebanon, it is not surprising that Hezbollah could stage massive protests in December of 2006 that nearly toppled the current leadership.[197] Beirut has no option but to allow Hezbollah to maintain its State within a State in southern Lebanon.

The issue is whether there is an "effective control" or "acknowledgement" basis for imputing Hezbollah's actions to Iran as required by the *Nicaragua* and *Hostage* cases.[198] At least one analyst argues that Hezbollah is not fully reliant on Iran. While there is no doubt that the organization originated and grew as a result of Iranian support and that they share strategic goals, Hezbollah now seems to be operating more independently.[199] Hezbollah certainly poses a threat to Lebanon's political independence, but Iran may escape responsibility as long as it does not acknowledge supporting Hezbollah's aggressive behavior.

The Iraqi insurgent groups, similarly, pose a threat in Iraq. Much like Hezbollah, however, they have never openly committed attacks against their host State. Their political aspirations are not per se illegal, nor are their open denouncements of any U.S.-supported government in Iraq. While they are repeat offenders of international humanitarian law, which could very well be attributable to Iran, they are not likely candidates for current interpretations of aggressive conduct toward a State. Iran, therefore, is able to act through its surrogates with impunity.

C. Policy Considerations Relating to "Indirect Aggression"

Aggression must be considered in terms of modern day realities. Large scale traditional wars are quickly becoming the exception rather than the norm. Threats posed by "internal" or "indirect aggression," recognized in the early years after

194. Sean Yoong, *Ahmadinejad: Destroy Israel, End Crisis*, WASHINGTONPOST.COM, Aug. 3, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080300629.html.

195. Phares, *supra* note 47.

196. *Id.*

197. Shadid, *supra* note 36.

198. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 65 (June 27); U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 35 (May 24).

199. Fuller, supra note 27, at 143.

WWII, should be considered a national security priority.[200] When determining which acts constitute aggression, or what deterrence measures need implementing, the primary objective must always be to protect "the State's independence as such."[201]

In 1953, Dr. C.A. Pompe concluded that, "When statesmen to-day speak of aggression they include in that concept every method, every action that can lead to the destruction of the liberty or the loss of territory of a State."[202] He adds that the territorial integrity and political independence of a State "must be seriously endangered by the use of force if this is to deserve the qualification 'aggression.'"[203]

Under Pompe's definition, Iran's use of armed groups to target the political independence of weaker States does not fit the classic model of aggression, and could not be considered armed aggression warranting coercive self-defense measures. He argues that "States cannot be allowed to answer with military measures every kind of foreign support or influence on internal attacks against the established political order and the legitimate government."[204] In contrast, others contend that a *causus belli* to attack Iran already exists based on its use of armed groups.[205] This position is supported by GA Res. 3314 and subsequent international case law which define State support of armed groups as aggression.[206]

Regardless of whether Iran's support to these groups can be classified as "aggression," the use of force in this situation is short-sighted. While this paper argues for a more expansive definition of aggression, particularly in relation to threats against the political independence of States, the blunt use of force would be a strategic mistake, highlighting the effectiveness of Iran's more sophisticated methods. Irrespective of the legality of coercive self-defense measures, the following section discusses a range of options available to target States of Iranian aggression, as well as a deterrence framework to be employed by the international community.

V. RECOMMENDATIONS & CONCLUSION: THE LEGAL FRAMEWORK FOR DETERRENCE

It is uncertain whether Iran's support of non-state armed groups is tantamount to aggression vis-à-vis these groups' host States. The need to deter Iran's conduct, however, is clear. While coercive measures have been considered, these are unlikely to be effective. For one, the use of force seems disproportionate to Iran's more sophisticated, clandestine operations within the target States. As mentioned

200. POMPE, *supra* note 156, at 93.

201. *Id.*

202. *Id.*

203. *Id.* at 106.

204. *Id.* at 111.

205. Michael T. Klare, *Three US Reasons to Attack Iran*, ASIA TIMES ONLINE, Feb. 27, 2007, http://www.atimes.com/atimes/Middle_East/IB27Ak01.html.

206. *See* G.A. Res. 3314 (XXIX), *supra* note 177; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 65 (June 27).

above, outright armed force has not been Iran's policy. Rather, an equally sophisticated and multi-faceted approach is required to deter Iran's foreign policy objectives.

A. Applying the Incentive Theory

In analyzing the causes of war and drafting a deterrence framework, Professor John Norton Moore applies his "incentive theory."[207] This approach, put simply, balances the incentives affecting decision makers on whether or not to engage in the aggressive use of force. It looks at three different levels, or "images," of incentives: the individual, the form of government, and the international system of deterrence. Even though the focus of this paper is not war as such, the incentive theory is adaptable to Iran's lower-level aggression: support of non-state armed groups.

The first image in the incentive theory is the individual. This encompasses the regime elites in Iran, the leaders of the non-state armed groups it supports, and the individual citizens that follow these groups.

The regime elites in Iran and the leaders of its non-state armed groups currently have little incentive to cease their unlawful conduct in Lebanon, Iraq, and the Palestinian Territories. For its part, Iran is able to externalize the cost of subverting these governments onto the armed groups themselves. Furthermore, Ayatollah Khamenei and President Ahmadinejad are enjoying a newfound sense of regional power, particularly when Hezbollah is extremely popular after the July War of 2006 against Israel, and the U.S.-led coalition is struggling to bring security to Iraq.[208]

Similarly, the leaders of Iranian-backed insurgent groups have little to fear as long as they receive top-cover from the Islamic Republic. Nasrallah in Lebanon, al-Sadr in Iraq, and Prime Minister Ismail Haniyeh in the Palestinian Territories all enjoy popular support in their host States, as well as the cover of political legitimacy.

An effective way to curb the unlawful and subversive activities of these groups is through international criminal law. Each of these groups has committed war crimes and crimes against humanity; for example: Hezbollah's murdering and kidnapping IDF Soldiers and launching rockets into civilian populations,[209] the murder of civilians through Mahdi's Army death squads,[210] and Hamas' suicide bombings of Israeli civilians.[211] Iran is a major sponsor of each of these groups' criminal endeavors. In fact, Human Rights Watch cited Iran for giving substantial financial and logistical support to Hamas' suicide bombing campaign.[212] For these

207. *See generally* JOHN NORTON MOORE, SOLVING THE WAR PUZZLE (2004).

208. Barry Rubin, *Iran: The Rise of a Regional Power*, 10 THE MIDDLE EAST R. INT'L AFF., Sept. 2006, http://meria.idc.ac.il/journal/2006/issue3/jv10no3a10.html.

209. Phares, *supra* note 47. *See also* Makovsky, *supra* note 43.

210. Ghosh, *supra* note 2. *See also Top Iraqi Official Held in Raid, supra* note 74.

211. Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians* 64, HRW Index No. 2807, Oct. 2002.

212. *Id.* at 96.

actions, the leaders of Iran and the insurgent groups should be held individually responsible. Effective punishment for blatant violations of international law would serve as a strong disincentive to continue their unlawful practices.

The individuals who follow Iranian-backed armed groups equally need disincentives. Hezbollah and Mahdi's Army, in particular, receive unwavering public support from the local population primarily because they provide social and financial assistance that the State cannot. This, and their appeal to disenfranchised Shi'a groups through the idea of armed resistance, has effectively won over the "hearts and minds" of their people.[213] In regard to the war on terror, some commentators argue that the international community, especially the United States, has done little to wage a "war of ideas" in the region.[214] Unfortunately, the United States has little credibility in the Islamic world.[215]

The Iranian population, similarly, has not been effectively engaged in the "war of ideas." This is unfortunate, since many Iranian reformists do not, in fact, support Hezbollah's attempts to provoke Israel or the use of suicide bombings to kill civilians.[216] It is worth noting that the relationship between Tehran and Hezbollah cooled – albeit slightly – during the presidency of reformist Muhammad Khatami.[217] Similarly, in the Palestinian territories, there is at least some indication that the Palestinian people will not suffer a radical, militant government. At least one commentator noted that, "The Palestinians did not vote for Hamas so that it could destroy Israel, but so that it could deal with security, corruption, the schools, and the water supply."[218]

In an effort to win the ideological struggle, the United States and the Western world need to stay behind the scenes. They must, however, cultivate the moderate population by discretely offering support to writers, scholars, journalists, and other intellectuals in the region who also advocate a non-violent, more moderate approach.[219]

The second image in the incentive theory is the form of government. In terms of waging major wars, empirical evidence proves that democracies are far less likely to be the aggressor.[220] Further evidence reveals that non-democracies are more likely to have slower economic growth, commit crimes against humanity (including genocide), suffer famines, support terrorism, be corrupt, be involved with narcotics trafficking, have higher levels of refugee flows, have higher infant

213. O'Brien, *supra* note 13, at 4.

214. William Rosenau, *Waging the "War of Ideas," in* THE MCGRAW-HILL HOMELAND SECURITY HANDBOOK 1131, 1138-39 (2006).

215. *Id.* at 1141. Although Rosenau focuses his analysis on the al Qaeda organization, the lack of an effective ideological campaign is felt in the broader region.

216. KARMON, *supra* note 20, at 19.

217. *Id.* at 18-19.

218. Olivier Roy, *The Shock Wave of the Hamas Victory*, LE FIGARO (Paris), Jan. 31, 2006, at 16 (Open Source Center trans.).

219. Rosenau, *supra* note 214, at 1142.

220. MOORE, *supra* note 207, at 14.

mortality rates, and have fewer women's rights.[221]

Many of these problems are seen in Iran's non-democratic theocracy. For example, in 2004 Iran received a score of 6.1 out of 10 on the economic freedom index, ranking 80 out of 130 countries surveyed.[222] These results are in spite of Iran's wealth of natural resources. Furthermore, the Islamic Republic has a history of discrimination towards groups such as the Turkic communities[223] and women.[224] The State also employs extreme censorship measures, particularly the state filtering system regulating the internet, rivaling that found in China.[225]

Lebanon, Iraq, and the Palestinian Territories are all fertile ground for Iran's policy objectives.[226] Weak states are chronically prone to insurgent groups that challenge their authority.[227] This plays into the larger struggle in the Middle East between an attempt at democratization and a new, re-energized resistance front. The main players are the United States and Iran on either side. It is hoped that, "Political integration of the Islamist parties is aimed at moving them away from violence and at preventing terrorism from drawing justification from the political frustrations of the populations of the Middle East."[228] With their popular support and abundant resources, the Iranian-backed insurgent groups must be encouraged to end their violent, extremist methods and move toward legitimate political and social endeavors. The State governments, meanwhile, must be given the means to prosecute and dismantle any unlawful militant groups in their territory.[229]

The third image in the incentive theory is the international system of deterrence. Effective deterrence can be defined as "a state of mind of the potential aggressor based on perceptions of an aggregation of external incentives."[230]

In order to deter the unlawful actions of the Iranian-backed armed groups, the international community must act cooperatively to supply the sitting governments with tools necessary to eliminate the militant wings of these groups through stringent law enforcement. Simultaneously, heavy diplomatic and economic pressure must be put on Iran, the sponsor of these groups. This can be done in several ways.

First, the United Nations must follow through on the sanctions regime imposed on Iran. In March 2007, the U.N. Security Council unanimously adopted Resolution 1747, which provides for Iranian cooperation with the International

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221. *Id.* at 60.

222. JAMES GWARTNEY & ROBERT LAWSON, ECONOMIC FREEDOM OF THE WORLD: 2006 ANNUAL REPORT 102, *available at* http://www.freetheworld.com/2006/3aEFW2006ch3A-K.pdf.

223. O'Brien, *supra* note 13, at 46.

224. On March 4, 2007, women protesters were arrested in front of a courthouse in Tehran. They were protesting discriminatory policies of the State against women. *See* BBCNEWS, *Iran Women Arrested Over Protest*, Mar. 4, 2007, http://news.bbc.co.uk/2/hi/middle_east/6416789.stm.

225. O'Brien, *supra* note 13, at 52-53.

226. *See generally* GWARTNEY & LAWSON, *supra* note 222.

227. *See* SHULTZ, TIER ONE, *supra* note 5, at 13-14.

228. Roy, *supra* note 218.

229. This approach presents a particular problem in the Hamas-governed Palestinian Territories.

230. MOORE, *supra* note 207, at 28.

Atomic Energy Agency (IAEA), bans arms exports from Iran, calls for an end to new loans, and freezes the assets of key Iranian leaders.[231] The sanctions imposed in December 2006 in Security Council Resolution 1737 were followed by 150 members of the 290 strong Iranian Majlis (parliament) signing a letter blaming Iran's current fiscal woes on President Ahmadinejad.[232] This is an indication that external pressure is having an effect.

Second, individual States should put pressure on Iran. For example, the U.S. Treasury Department banned Bank Saderat from the U.S. financial system in September 2006.[233] Pressure from the international community, such as the joint statement issued by U.S. Secretary of State Condoleeza Rice in conjunction with Egypt, Jordan and six other gulf States warning Iran, has impacted internal politics of the Islamic Republic.[234] Similarly, the recent designation of the IRGC as a terrorist organization by the United States will put financial pressure on Iran's elite military unit and primary trainer and intelligence provider to outside armed groups.[235]

Third, pressure must be put on the groups Iran supports. A success story is the U.S. Treasury designation of Jihad al-Bina – Hezbollah's construction company in Lebanon.[236] This shut the firm out of the international financial system. Consequently, lenders and donors will not run the risk of rebuilding Lebanon through Hezbollah, rather than through the legitimate Lebanese government.[237] According to the Treasury Department, "Jihad al-Bina receives direct funding from Iran, is run by Hizbullah members, and is overseen by Hizbullah's Shura Council, at the head of which sits Hizballah Secretary General Hassan Nasrallah."[238]

Finally, the United States should not be too quick to leave Iraq. Quite frankly, an unstable Iraq without the presence of coalition forces will be wide open to Iranian influence. Iran has already stated that the U.S. presence in the region is their biggest security concern.[239] As long as Iran is aware that there is a deterrent

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231. S.C. Res. 1747, ¶¶ 1-2, 4, 5, 7, Annex I, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

232. Mehdi Khalaji, WASH. INST. FOR NEAR EAST POL'Y, *Iran Feels the Heat: International Pressure Emboldens Tehran's Domestic Critics*, PolicyWatch No. 1185, Jan. 18, 2007 [hereinafter *Iran Feels the Heat*].

233. Press Release, U.S. Dep't. of Treasury, Treasury Cuts Iran's Bank Saderat Off From U.S. Financial System, HP-87 (Sept. 8, 2006) (on file with the U.S. Dep't of Treasury, http://www.treas.gov/press/releases/hp87.htm).

234. *Iran Feels the Heat*, *supra* note 232.

235. Robin Wright, *Iranian Unit to Be Labeled 'Terrorist'; U.S. Moving Against Revolutionary Guard*, WASH. POST, Aug. 15, 2007, at A1.

236. Press Release, U.S. Dep't of Treasury, Treasury Designates Hizballah's Construction Arm (Feb. 20, 2007) (on file with U.S. Dep't of Treasury, *available at* http://www.treas.gov/press/releases/hp271.htm). *See also* Gregory S. McNeal, *Cyber Embargo: Countering the Internet Jihad*, 39 CASE W. RES. J. INT'L LAW 811-816 (2008) (discussing the Treasury designation process and its use in fighting terrorists and rogue states).

237. *See* Matthew Levitt, WASH. INST. FOR NEAR EAST POL'Y, *Shutting Hizballah's 'Construction Jihad'*, Feb. 20, 2007, http://www.washingtoninstitute.org/print.php?template=C05&CID=2571.

238. *Id.*

239. O'Brien, *supra* note 13, at 49.

force in the region it will be less likely to commit even more heinous crimes.

B. Conclusion

Iran's support of non-state armed groups is an effective method to achieve its foreign policy objectives. By subverting governments in the region through the cultivation of these dual political and militant organizations, Iran is able spread its particular form of Shi'a influence.

Compared to other State supporters, Iran's use of insurgent groups is more sophisticated and less likely to draw the rebuke of the international community. Drawing upon public support, Hezbollah, the Iraqi insurgents, and Hamas have effectively established parallel governments to their host States, gained a foothold within the legitimate political apparatus, ingratiated themselves with the local populations with an attractive revolutionary ideology and extensive social services, and utilized the expertise of the IRGC's Quds force intelligence and training capabilities.

These actions alone are not enough to meet the standards of unlawful aggression under accepted interpretations of *jus ad bellum* law. Other conduct, such as the attacks against Israel by Hezbollah and Hamas, could very well be imputed to Iran as aggression, but the political and social subversion of the sitting governments in Lebanon, Iraq, and the Palestinian Territories does not in itself warrant coercive self-defense measures. This does not mean, however, that Iran is not violating international law or that the international community is helpless to effectuate change.

Incorporating the incentive theory to Iran's unlawful activity is an effective, multifaceted approach to dealing with a cunning threat. There is a large moderate population in the region that needs cultivating and support so that the ideologies of violence and hate do not continue to hold sway. The leaders that support the undermining of legitimate governments must be held accountable. Encouraging democratic reform, while maintaining economic pressure, is certain to have a deterrent effect on the bankrupt policies of Iran and the unlawful armed groups it supports.

INTERNATIONAL LAW FIGHTS TERRORISM IN THE MUSLIM WORLD: A MIDDLE EASTERN PERSPECTIVE

MOHAMED R. HASSANIEN*

INTRODUCTION

The September 11 terrorist attacks ignited global interest in the Muslim world;[1] hence the region has become a primary concern for the international community, with national security bolted to the forefront of the American foreign policy and that of the rest of the world as well.[2] Six years after the attacks on New York, Pennsylvania and Washington DC, the American perspective has been the prevailing one in most of the writings about International law and terrorism. However, the Middle Eastern approach toward international terrorism needs to be explored carefully in light of the globalization that is taking place everywhere.

The Muslim world – in the post-September 11 era – has been the scene for major American operations whether in Afghanistan or Iraq.[3] Consequently, Muslims consider the U.S. to be the major threat to them.[4] The populace in the Middle East contemplates the invasion of Iraq, Afghanistan and the current tension between Iran and U.S. as major reasons to root in rather than uproot terrorism in the Middle East. After almost four years of the war on Iraq, international terrorism has proven to be a pervasive and unconventional enemy, making it evident that the use of force is no longer the most effective tool in combating it. Free trade,

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1. Tarik M. Yousef, Development, Growth and Policy Reform in the Middle East and North Africa 2 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594621; *see also* Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161, 179 (2006).

2. *See* Maxwell O. Chibundu, Commentary, *For God, For Country, For Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 892-898 (2004); Tung Yin, *The Impact of the 9/11 Attacks on National Security Law Casebooks*, 19 ST. THOMAS L. REV. 157, 160, 162 (2006).

3. Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299, 300-301 (2006).

4. P.W. SINGER, THE 9-11 WAR PLUS 5: LOOKING BACK AND LOOKING FORWARD AT U.S.-ISLAMIC WORLD RELATIONS 2 (Brookings Project on U.S. Relations with the Islamic World Analysis Paper No. 10, 2006), *available at* http://www.brookings.edu/papers/2006/09islamicworld_singer.aspx.

economic development, strengthening international law and engaging the Muslim world could equally solve the problem. These tools have to be considered in the American portfolio of combating international terrorism.

America, as a global power, has to realize that engaging other parts of the world, including the Muslim world, in the war on terror is a must. International terrorism has two sides;[5] Shibley Telhami described the terrorism phenomena as having two sides, the first is the demand side, where international trade law could be relevant.[6] As free trade agreements are more than liberalizing certain markets, they have a lot of economic and political ramifications that may defuse the causes of terrorism in the Middle East. However, this paper does not propose that free trade is the ultimate solution for terrorism in the Middle East, but rather suggests that free trade is one of the tools that may provide a way out of the problems that besiege the region. But it would be meaningless or even harmful if it is not accompanied with political reform in the region.[7] The strengthening of international treaty law, the law of armed conflict, and engaging the Muslim world in the fight against terrorism can also help combat the supply side of terrorism.

This paper presents a Middle Eastern perspective for what may be the best course in the global war on terrorism. Part one illustrates the reasons why terrorism is more prevalent in Middle East now and the stance of Islam on terrorism. The second part explores the role of free trade in the development of the Middle East, applying the case-study of the Middle East Free Trade initiative (MEFTA) and highlighting the major developments of this initiative and the current challenges and opportunities awaiting countries in this region. Part three is devoted to exploring the norms embodied in international law which relate to international terrorism, and how the U.S. and the Muslim world could jointly work toward improving the stance of international law norms on terrorism.

I. TERRORISM IN THE MIDDLE EAST

Two polarized approaches compete in the debate on the causes of terrorism in the Middle East.[8] The first one focuses on the root causes, which are simply: poverty, ignorance, and lack of political expression, which create a breeding ground for terrorist groups. Consequently this approach calls for a certain set of priorities in dealing with terrorism, which are political, social and economic development in the Islamic world. This theory is called the *demand side* of terrorism.[9] The second approach denies any economic-socio reasons for terrorist attacks; it rather presents the threat as a mere security issue, and dealing with this

5. Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L L.J. 581, 586-87 (2002).

6. *Id.* The demand-side of terrorism means terrorist organizations, regardless of their aims, that need to recruit willing members, raise funds, and appeal to public opinion in pursuit of their political objectives. The supply-side of terrorism is the product of organized groups that could be confronted and destroyed, without regard to their aims or to the reasons that they succeed in recruiting many willing members.

7. John L. Esposito, *Political Islam and U.S. Foreign Policy*, 20 FLETCHER F. WORLD AFF. 119, 126, 130, 132 (1996).

8. SINGER, *supra* note 4, at 4.

9. Telhami, *supra* note 5, at 586-87.

would invoke intelligence, protection and coercive action.[10] This is the *supply side.*[11] Proponents of the first approach argue that the U.S. is trying to combat an ideology -created in intense poverty and in a desperate environment- by using military force. Ideology can only be defeated by a similar or stronger ideology and by eliminating all the conditions where violent ideology grows. Proponents of the second approach explain that September 11 hailed primarily from an either upper or middle/well connected class in their countries.

In this article, I propose that terrorism with its two sides (demand and supply) should be tackled in international law. The first part will uncover the political and economic situations in the Middle East, and how the U.S. and Muslim World perceive each other. It will provide an analysis of how Islamic law could be useful in the war on terrorism.

A. Politico-Economic Conditions in the Middle East

A complete understanding of why terrorism has a fertile environment in the Middle East cannot take place without taking into account the political and economic framework of the countries in this region. The cultural and the historical development of the Middle East should be highlighted as well. In his article, *Origins of Terrorism*, Herbert Kitschelt described The Middle East as a region which "appears to be trapped in a vicious circle of low growth, bad institutions of governance, and resistance to economic globalization."[12] President Bush in the 20th anniversary of the National Endowment of Democracy, announced that "[i]n many Middle Eastern countries, poverty is deep and it is spreading, women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines."[13]

Countries in the Middle East are suffering from daunting challenges; the ability to absorb the labor force, creating jobs and the increasingly competitive nature of the global economy, particularly China, India and the Philippines,[14] low levels of foreign direct investment (FDI), lack of technology, industrial incompetence, high levels of government investment and ownership, and the high costs of doing business.[15] After the oil boom in the 1970s, the Middle East economies shifted from diverse agricultural and textile markets to single commodity exporters. Great optimism marked the economies of the Middle East in

10. SINGER, *supra* note 4, at 4.

11. Telhami, *supra* note 5, at 586-87.

12. Herbert Kitschelt, *Origins of International Terrorism in the Middle East*, INTERNATIONALE POLITIK UND GESELLSCHAFT [INTERNATIONAL POLITICS AND SOCIETY], Vol. 1 2004, at 159, 163.

13. George W. Bush, U.S. President, Remarks by the President at the 20th Anniversary of the National Endowment for Democracy (Nov. 6, 2003), http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html.

14. MARCUS NOLAND & HOWARD PACK, THE ARAB ECONOMIES IN A CHANGING WORLD 19, 46, 48, 102-103 (2007).

15. *Id.* at 175, 177, 179, 181; Paul G. Johnson, *Shoring U.S. National Security and Encouraging Economic Reform in the Middle East: Advocating Free Trade with Egypt*, 15 MINN. J. INT'L L. 457, 459 (2006); Yousef, *supra* note 1, at 11, 20, 21, 23.

the early 1990s because gulf war ended, the Madrid conference brought Israelis and Palestinians together for the first time, and countries in the region started to adopt IMF and World Bank recommendations.[16] Tarek Yousef reasoned why political leaders in the region have been reluctant reformers despite the region's potential. It was obvious to the elite that pursuing economic and political reforms simultaneously threatened the existing political order.[17] He argued that as a result, top down management of economic reform replaced earlier efforts to generate support for economic reform by opening the political arena.[18] Jonathan Macey and Ian Ayres argued that the true stumbling block to economic reform in the Middle East is a divergence between the incentives of rulers and entrenched elites and the interests of potential entrepreneurs. Economic liberalization will have a democratizing effect, thus threatening the political and economic insiders.[19]

On the political scene, highly undemocratic and stable regimes exist at the same time.[20] For instance, the Arab world is unique in the prevalence of long lived, undemocratic regimes consisting largely of monarchies.[21] Islam with its principles of Tauheed, consultations, Ijma and Ijtehad,[1] possesses a strong pluralistic tradition. However, leaders in the Muslim world are disinclined to embody these ideas and principles in their political structure.[22]On the ground, authoritarian governments predominate in the Muslim world; moreover, most regimes in the region are apt to corruption, patronage, and clientalism.[23] There is no accountability of public authorities and they remain, in large part, unresponsive if not incompetent to meet public needs.[24] Governments in the region have used and will continue to use their talent for the co-optation of potential political opposition to consolidate their authority.[25] Consistently ranked among the worst regimes in the world in their refusal to uphold their citizens' political freedoms, human rights, and civil liberties, the authoritarians in this region are quite effective at clamping down on both secular and liberal opposition and Islamist groups.[26] Most governments in the Middle East believe in risk free democracy;[27] they organize

16. Yousef, *supra* note 1, at 2.

17. *Id.* at 29.

18. *Id.*

19. Ian Ayres & Jonathan R. Macey, *Institutional and Evolutionary Failure and Economic Development in the Middle East*, 30 YALE J. INT'L L. 397, 411, 413 (2005).

20. MARCUS NOLAND, EXPLAINING MIDDLE EASTERN AUTHORITARIANISM 2 (Peterson Inst. for Int'l Econ. Working Paper No. WP 05-5, 2005), *available at* http://www.iie.com/publications/interstitial.cfm?ResearchID=523.

21. NOLAND & PACK, *supra* note 14, at 273.

22. Tassaduq Hussain Jillani, *Democracy and Islam: An Odyssey in Braving the Twenty-First Century*, 2006 BYU L. Rev. 727, 744-45 (2006).

23. *See* NOLAND, *supra* note 20, at 5.

24. SINGER, *supra* note 4, at 8.

25. DAVID M. MEDNICOFF, LEGALISM SANS FRONTIÈRES? U.S. RULE-OF-LAW AID IN THE ARAB WORLD 12 (Carnegie Endowment for Int'l Peace, Rule of Law Series No. 61, 2005), *available at* http://www.carnegieendowment.org/files/CP61.Mednicoff.FINAL.pdf.

26. *See* Ayres & Macey, *supra* note 19, at 416-17; Esposito, *supra* note 7, at 124, 125, 127; SINGER, *supra* note 4, at 8.

27. Esposito, *supra* note 7, at 124.

elections that they are not going to lose. In terms of rule of law, governments are reluctant to facilitate rule of law projects that foster real political liberalization.[28] When it comes to economic development, the ruling elites rationally oppose economic development because it would lead to social changes that may threaten their hold on power. Unlike developed countries, slow economic growth is compatible with the rational self interest of the leaders in the region; growth would alter the balance of power between the rulers and potential rival coalitions and increase the probability of political change.[29] Muslims' influence was increasingly diminished in the sixteenth century. Continuous defeats at the hands of Christian Spanish isolated Muslims from society or turned them into slaves to Christians. As the eighteenth century came to a close, Islamic civilization eclipsed.[30]

The breakdown of the Othman Empire brought about independent Muslim states administered by corrupt and inefficient national regimes, which were frequently subservient to the prior colonial powers or to the new neo-imperial power, the U.S. Muslim masses were oppressed by foreign powers, and continue to suffer at the hands of their own leaders, which has worsened their grievances.[31]

In a speech before leaving office, Bill Clinton mentioned: "we have seen how abject poverty accelerates conflict, how it creates recruits for terrorists and those who incite ethnic and religious hatred, [and] how it fuels a violent rejection of the economic and social order on which our future depends."[32] His words are more significant now than at any other time.[33]

Peter Singer,[34] a senior fellow at the Brookings Institute, mentioned that "[the] combination of human development gaps and broken regimes goes a long way in explaining both the failing environment in which radicals thrive and the pool of simmering anger they are able to tap into."[35] As an Egyptian who grew up in the Middle East, I believe that strong economic and political reform would also go a long way in uprooting the causes of terrorism in this region. Free trade agreements, with their overreaching coverage, could be one of the tools used to reform the Middle East. Suggesting that economic opportunity is part and parcel of the war on terrorism, Kevin Fandl of George Mason proposes a comprehensive development program[36] that addresses legal, social, and economic concerns, which some scholars believe are more needed than military operations.[37]

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28. *See* MEDNICOFF, *supra* note 25, at 15.

29. Ayres & Macey, *supra* note 19, at 417, 422.

30. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT'L L., 119, 142 (2007).

31. *Id.*

32. Kevin J. Fandl, Critical Essay, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 597 (2004).

33. *See id.*

34. Peter Singer is Senior Fellow and Director of the 21st Century Initiative at the Brookings Institute; between 2001-2006, he was the founding director of the Project on U.S. Relations with the Islamic World. SINGER, *supra* note 4, at v.

35. *Id.* at 8.

36. Fandl, *supra* note 32, at 593.

37. *Id.* at 602.

B. How Middle Easterners Perceive the U.S.?

In the aftermath of September 11, in response to a question about why people in the Middle East hate America, President Bush said, "they hate what see right here in this chamber, a democratically elected government... they hate our freedoms, our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."[38] Bush's analysis leads us to the conclusion that cultural dissonance is the driving force behind the attacks on America.[39] John Quigley wrote an excellent comment to this effect. In his article, he argued that the current administration failed to analyze the reasons of this attack. Moreover, he suggested U.S. foreign policy in the Middle East is the "but for" cause of these attacks.[40] Arunabha Bhoumik also criticized U.S. policy of employing war mentality to combat terrorism. He suggested that the U.S. government look into the root causes of terrorism.[41] The miscalculations in U.S. policies are reciprocated by:

> [A] seemingly endless supply of recruits to Anti-American causes, unsurprisingly these miscalculations include 1) support for repressive regimes in the Middle East, including Saudi Arabia, Egypt, Morocco and Jordan. 2) unconditional U.S. support for Israel, and 3) indifference to the plight of Muslims in Chechnya, Kashmir, and the Balkans. The war on terror, including the invasion of Iraq in spring 2003, has given more grounds to the anti-American cause.[42]

As a Middle Easterner, Americans would find it surprising to hear that antipathy toward the U.S. and the west in general, does not flow from cultural dissonance. It is based not on who Americans are perceived to be but on what Americans are perceived to do. Muslims in the Middle East have a favorable view of the American educational system, form of government, U.S. freedom and democracy. Yet when it comes to U.S. policy in the region, the same people have a very negative opinion. Consequently, antipathy towards western norms and civilization does not emanate from religious or cultural reasons but rather a response to perceptions and judgments regarding U.S. policy in the Middle East.[43]

The West, in general, is perceived by the people of the Middle East as colonizers who want to exercise dominance over other developing countries.[44]

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38. President George W. Bush, Address on Terrorism before a joint meeting of congress, (September 21, 2001) *available at* http://query.nytimes.com/gst/fullpage.html?res=9405EEDC1E3BF932A1575AC0A9679C8B63&sec=&spon=&pagewanted=2.

39. *See e.g.*, John Quigley, *International law violations by the United States in the Middle East as a factor behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 817 (2002).

40. *Id.* at 816.

41. Arunabha Bhoumik, *Democratic Responses To Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J.INT'L L. & POL'Y 285, 286 (2005).

42. *Id.* at 344.

43. Mark Tessler, *Arab and Muslim Political Attitudes: Stereotypes and Evidence from Survey Research*, 4 INT'L STUDIES PERSPECTIVES 175, 180 (2003).

44. Fandl, *supra* note 32, at 630.

Dropping an arsenal of bombs on these countries will only exacerbate the situation and reinforce the stereotype, which has been drawn by the people in this region during the imperialism era. The continuing war in Iraq has given more grounds to terrorist organizations. Huge majorities in the Muslim world are aware of the abuses at Abu Gharib and Guantanamo Bay.[45] Moreover, every student coming from the Muslim world to study in the United States has a nightmare that he/she may be held over in Guantanamo if the intelligence in the United States confuses him/her with a terrorist. The U.S. faces a difficult path in repairing its standing in the Muslim world.

Radicalization of a substantial part of Middle Eastern policy is attributed to stagnated economic and social programs coupled with a lack of political liberties, "including antipathy toward U.S. policies - which are widely perceived as the main source of support for the oppressive regimes in the region."[46] Five years into the war in Iraq, by and large, the U.S. has failed in this cold war of ideology: a growing number of Muslims embrace extremist views that could ultimately lead to increased terrorism. U.S. foreign policy is in a dilemma. For decades stability was the top priority in the United States' agenda towards the Middle East; however, the support for stability in the region came at greater costs to the U.S. Stability was not a cost free strategy, the cost was paid by un-free Middle Eastern people and bad democratic governance.[47]

Intellectuals remain at best very skeptical of U.S. intentions in the region, Mohamed Selim Elawa,[48] a well known Egyptian lawyer and columnist, harshly criticized the U.S. initiative in the Middle East and attributed all the mischief in the region to two things: the penetration of Americans in the region and the brutal and dictatorship regimes that continue to control the middle east.[49] In terms of the general populace, the most popular movie in Egypt, the largest country in the region, was "The night Baghdad fell," a black comedy that describes an American invasion of Egypt.[50] And in Turkey, a strong ally to the U.S., the movie "Valley of the Wolves," which fantasizes about Turkish troops inflicting revenge upon evil American troops after they bombed a mosque and shot up a wedding, was well received by the Turkish public.[51]

As America continues its policies of supporting corrupt and inefficient regimes in the Muslim world, blindly supporting Israel, even against the Palestinians' most elementary rights, popular anger and frustration boils over throughout the Muslim world.[52] To some among the downtrodden masses,

45. Singer, *supra* note 4, at 18.

46. Khairi Abaza, *Political Islam and Regime survival in Egypt,* Policy Focus No. 51 (Washington, DC: The Washington Institute for Near East Affairs, January 2006).

47. *Id.* at 7.

48. Mohamed Selim El-Awa, a highly regarded Egyptian lawyer, called to be one of the founders of new Islamist movement which seeks a new reform in Islamic thoughts.

49. *Available at* http://www.masrawy.com/new/ (Arabic language source on file with author).

50. Singer, *supra* note 4, at 2.

51. *Id.*

52. Bassiouni, *supra* note 30, at 142.

America is perceived as the source of the contemporary evils that befall upon Muslims.[53] Hence many Muslims consider violence as the only means of expression left to them, and leaders who claim that violent jihad is a justified course of conduct against the western invasion become popular. Many Muslims will seek violent jihad as an answer to the dilemma they are having.[54] Their legitimacy of purpose trumps all else—the end justifying the means. Over time, proponents of the strategy of terror-violence against the U.S. and the West have acquired credibility, not to say legitimacy, even though their strategy includes resorting to indiscriminate violence against innocent civilians, which is in violation of the very Islamic precepts. Unjustifiable as these tactics are, their proponents see them as the only way to balance the asymmetry of the forces they face in an un-just world where no other remedies are available in hand.[55]

Muslims have pride in their glorious history as they were –from Samarkand to Cordoba- producing intellectuals, scientists, thinkers, artists, enlightened rulers and societies that evidenced religious tolerance and economic progress at a time when Europe was still debating whether women have souls.[56] Muslims attribute the deterioration of their civilization to repression, backwardness, and losing our way, rather than to Islam. We strongly reject any link between Islam and the deterioration of our civilization because Islam itself was our guide in the early days to building one of the most regarded civilizations in humankind's history. Nonetheless, the values upon which the West built its progress are fundamentally universal; moreover these values have been in the fabric of the Islamic religion since its early days.

Violence, degradation and hypocrisy are three concepts that, by and large, shape how Muslims perceive the West. Violence is evident in Iraq, Afghanistan, Palestine, Chechnya, as well as in the ugly war of the summer of 2006 against Lebanon and in threats against Iran. Hypocrisy becomes evident when Tony Blair (former British PM) preaches to Arabs about democratic principles, and then visits Libya to meet Colonel Gaddafi to negotiate his re-entering the international community.[57] Hypocrisy is inherent in Condoleezza Rice's revision of American strategy in the aftermath of Hamas' victory in fair elections in Palestine, the Muslim brotherhood's in Egypt and Ahmedinejad's in Iran after she preached to the Egyptians about democracy in the Middle East in her speech in front of the American University in Cairo.[58] Degradation is conspicuous in debating pulling away American troops because of losing 4000 but not thinking of the causalities of Iraqis, in equating deaths of thousands in Lebanon with the inconvenience of relocating some northern Israeli settlers for less than three weeks, and when Hezbollah captured three Israeli soldiers, Lebanon has to pay billions of dollars to

53. *Id.*

54. *Id.* at 143.

55. *Id.*

56. Tarek Osman, *A Liberal Muslim's letter to the West*, Daily Estimate, Apr. 12, 2007, *available at* http://www.dailyestimate.com/article.asp?id=8983.

57. *Id.*

58. *Id.*

repair what Israeli air strikes damaged.[59]

C. How Americans Perceive the Middle East?

In the post September 11th legal and political environment, anti-American sentiment in the Middle East is reciprocated by a growing anti-Arab and anti-Islam sentiment in America.[60] As manifestations of violence by Muslims increase in different parts of the world, so do anti-Islam sentiments, particularly in the Western world. Reciprocal negative perceptions between the Western and Muslim worlds continue to escalate, threatening peace and security in Muslim countries and elsewhere in the world. Americans understand Islam as a religion which condones killing of other people in the name of Allah (the Arabic word means God). It is too easy to equate Islam with the poverty and material backwardness of most Islamic countries.[61] Islam appears to be an aggressive religion to the Western writers and critics. Muslim civilization has been castigated as being backward, insular, stagnant, and unable to deal with the demands of modernization. Muslims are stereotyped as fanatics, intolerants, violent and thirsty for wars of aggression.[62] The average westerner thinks of Islam as fanatical, xenophobic, and a destructive force.[63] In his 1996 article, John Esposito warned Americans that in the post-cold war period, Islam will be seen as the next global threat, both ideologically and politically, in order to fill the threat vacuum.[64]

If Americans are seen as the rapists, bullies, and mindless killers in the culture of the Muslim world, Muslims are seen no better by the American mainstream media.[65] Villains in Hollywood movies or TV shows invariably have terrorism link back to a Muslim terrorist group or cause. William Fisher, a former U.S. diplomat, warned of an "uninformed and unreasoning Islamophobia that is rapidly become implanted in our national genetics."[66] News and people from the Middle East are received with themes of hurt, fear and suspicion. The conceptualization of the threat has many fronts. In general, while the government would consider the threat from a certain organization, most Americans would consider it from a region or ideology or both. Fox News Network host Bill O'Reilly commented about writing a book about Islam, and he denounced the idea by saying it is "our enemy's religion."[67] In his famous book "Clash of Civilization", Professor Samuel Huntington of Harvard asserts that "some westerners have argued that the West does not have problems with Islam but only with violent Islamic extremists... but evidence is lacking... the underlying problem for the west is not Islamic

59. *Id.*

60. Singer, *supra* note 4, at 2.

61. John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 583 (2001).

62. Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International law*, 10 J. CONFLICT & SECURITY L. 321 (2005).

63. Carroll, *supra* note 61, at 583.

64. Esposito, *supra* note 7, at 131.

65. Singer, *supra* note 4, at 2.

66. William Fisher, *Bush's Mixed Signals*, COUNTER-CURRENTS, April 21, 2006, *available at* http://www.countercurrents.org/fisher050406.htm.

67. Tessler, *supra* note 43, at 175.

fundamentalism. It is Islam."[68] He goes on to describe Islam as a religion of the sword... glorifying military virtues. In his perception, the Quran (Holy Book of Muslims) "and other statements of Muslim beliefs contain few prohibitions on violence and a concept of non-violence is absent from Muslim doctrine and practice."[69]

Today, intellectual westerners misconstrue Islamic principles and tenets as terrorism and fundamentalism. The media has reinforced a false stereotype of Muslims and Islam.[70] A researcher in the American Enterprise Institute has argued that Bin Laden is applying what he has learnt from Quran. He is fully justified to kill thousands of civilians because God in Islam asked him to do so.[71]

D. Islamic Stance on Terrorism

The overarching principle in Islam concerning violence is the famous verse in the Quran: "the taking of one life is like the killing of all humankind."[72] Islam strongly renounces the killing of innocent civilians, children and women even in war times.[73] Principles and tenets of Islam encourage and promote coexistence and cooperation, not confrontation and hate. From the early days of Islam, Prophet Mohamed hosted the Jewish in the first Muslim city ever in history.

Islamic law is one of the world's major non-western legal systems. Sharia (the right path in Arabic) includes a conglomeration of Islamic law principles.[74] As long as a substantial number of terrorist acts are perpetrated by or upon Muslims, or within Islamic lands, the proper legal focus must not be limited to an exclusively western sense of legality, Islamic legal theory has to be explored to fully understand and ultimately control international terrorism. Islam claims 20% or more of the world's population as its adherents.[75] A complete understanding of the stance of Sharia on international terrorism will be helpful. A brief orientation of the hierarchy of Islamic law is critical; Sharia includes two types of sources, primary and secondary sources.

The primary source of Islamic law (Sharia) is the Quran. Muslims believe that the Quran is the word of God, which Mohamed, the last prophet, relayed through revelations from 610 A.D. until 632 A.D. The Quran contains 114 suras, it is the constitution of all Muslims, a source which trumps all other sources and is regarded by Muslims as the highest authority in all facets of life, including legal,

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68. *Id.*

69. Ali & Rehman, *supra* note 62, at 329.

70. John H. Donboli and Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 418 (2005).

71. Ali Alfoneh, American Enterprise Institute, October 2007 (on file with author).

72. U.S. Inst. of Peace, *Special Report: Islamic Perspectives on Peace and Violence*, Jan. 24, 2002, at 3, *available at* http://www.usip.org/pubs/specialreports/sr82.pdf.

73. Quintan Wiktorowicz and John Kaltner, *Killing in the name of Islam: Al-Qaeda's Justification for September 11*, 10 Middle East Policy Council 2 (2003), *available at* http://www.mepc.org/journal_vol10/0306_wiktorowiczkaltner.asp.

74. Donboli and Kashefi, *supra* note 70 at 418.

75. David Aaron Schwartz, *Note: International Terrorism and Islamic Law*, 29 COLUM. J. TRANSNAT'L L. 629, 634 (1991).

social, political and economic matters.[76] The second source of Islamic Law is the *Sunna* or traditions of the prophet Muhammad. Sunna (Tradition) is the Prophet Mohamed's reported sayings, deeds, and approval of practices. Where the Quran is silent or ambiguous, Sunna is considered to be a supplementary or interpretative source.[77]

> Secondary sources of Islamic law consist of Ijma, or agreement of jurists among the followers of the Prophet Muhammad in a particular age on a question of law.... Ijma, as a source of law, is supported by the *Quran* and *Sunna*, [and]... *qiyas*, translated as analogical deduction. Analogy can only be employed if no guidance is available on the point under discussion in any of the other three sources of law. Another source of law is *ijtihad*, which literally means striving [or] exerting.[78]

Sharia is a driving force in the Middle East, where most people are religious or reluctant to challenge religious beliefs. Sharia is the highest source of legal reference in Saudi Arabia's, Iran's and Egypt's constitutions, which are the main source of legislation.[79] Sharia is a complete legal system which has its own distinct characteristics and is recognized by international law.[80] I will examine three different doctrines of Islamic jurisprudence which bear directly on international terrorism: the role of international covenants, Jihad (a particular emphasis on this word), and forbidden acts to show that Islamic treaty law is rich with principles that renounce terrorism.

1. International Covenants

Muslim countries have to honor their obligations under international treaties.[81] This sense of legal obligation does not stem only from the sanctions which would be imposed if there is a violation of any of the treaties' provisions. Rather, a simple verse in the Quran also obliges Muslims to honor their contractual obligations: "O Believers, you have to honor your contractual agreements."[82] This means that every Islamic country that has entered into an anti-terrorist compact is committed under Islamic law to honor that agreement. Moreover, Muslim jurists have ruled that international covenants acceded to by Islamic countries have become a part of Islamic law.[83]

Multilateral covenants, compacts and agreements have long been the legal method of choice for combating terror violence. Sharia sanctions violations of these agreements; every Islamic country that has entered into an anti-terrorist compact is committed under Islamic law to honor that agreement.[84] Many Islamic

76. Ali & Rehman, *supra* note 62 at 324-25.
77. *Id.* at 325.
78. *Id.*
79. Schwartz, *supra* note 75, at 636.
80. *Id.*
81. *Id.* at 637-38.
82. *Id.*
83. *Id.*
84. *Id.* at 637.

countries have signed most of the multilateral covenants that explicitly address acts of international terrorism. Schwartz found a double effect for Sharia in respect to terror violence. First, Islamic countries are authorized to enter into agreements that punish and extradite terrorists located within their jurisdiction. Second, a global agreement addressing terror violence would be welcomed by Islamic countries.[85] Since the inception of the UN and the prohibition of the use of force, Islamic countries have fully complied with the UN charter, renouncing terrorism, aggression and violence, in addition to maintaining their Islamic credentials, which is consistent with As-siyar. Moreover, the preamble of the charter of the Organization of Islamic conference affirms the commitment of Islamic countries to adhere to the principles found in United Nations charter.[86]

2. "Jihad"

"[T]he classical *jihad* ideology is often deployed to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations charter."[87] This misunderstood word is used to embrace the concept that Islam condones the killing of people in the name of God. On the contrary, Jihad is a very broad Arabic word, and it "does not have a singular meaning but can be qualified to suggest different things."[88] A literal meaning of it is "'effort,' 'attempt;' or 'exertion'... to overcome evil."[89] Ibn Taymiyya, a prominent Muslim scholar in the medieval centuries, explained the concept "Jihad" as a means of defensive war to protect Dar Islam (Muslim states) against invaders,[90] similar to the notion of self defense under international law. Islamic scholars distinguish between greater Jihad, which means the struggle one has against oneself, with lesser Jihad, which refers to fighting in the name of God.

> [T]errorists use the Islamic historical division of the world into two parts, Dar al Islam and Dar al harb, to set up the framework for their offensive Jihad... However, a careful contextual reading of verses in Quran and others rebut the terrorist's interpretation. Moreover, many scholars argue that viewing Jihad as an offensive war is faulty and fails to take into account the underlying religious beliefs and responsibilities... Terrorists pick and choose certain tenets of Sharia to justify their actions... [and] use Islam as a political tool to further their specific agendas.[91]

Thus it would seem that Islam, unlike Christianity, justifies killing in some circumstances.

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85. *Id.* at 640-41.

86. Ali & Rehman, *supra* note 62, at 343 (internal citations omitted).

87. *Id.* at 322.

88. RACHEL SALOOM, *Comment: Is Beheading Permissible Under Islamic Law? Comparing Terrorist Jihad and the Saudi Arabian Death Penalty*, 10 UCLA J. INT'L L. & FOREIGN AFF., 221, 229 (2005).

89. John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 98 (2002).

90. *See* Bassiouni, *supra* note 30, at 131-34.

91. SALOOM, *supra* note 88, at 248.

Political violence has existed in every civilization. "Throughout its fifteen centuries [Islam] has witnessed political turmoil and upheavals and also periods of peace and stability, during which the sciences and the arts have made extraordinary strides and contributed significantly to other civilizations."[92] The Muslim world has, in the last two hundred years, suffered at the hands of Western imperial powers. Recently, the Muslim world has started to selectively strike back against the Western world, with the U.S. responding in kind, thus fueling predictions of a "clash of civilizations." The endless circle of blood between Americans and Muslims (in Iraq) may feed into the proposition that there is a conflict of civilization between the Muslim world and the Jeudo-Christian western civilization. This self fulfilling prophecy put succinctly by Cherif Bassiouni evoked Muslims to be inclined to accept a new anti-American sentiment to political Jihad as long as it is reciprocated by an increasing anti-Islam approach by Neoconservatives, the protestant Christian right and other American Pro-Israel supporters. Therefore, Bassiouni added that the modern doctrine of Jihad can only be explained by taking account of historical, social, political and economic events that surrounded and influenced Muslims.[93]

Nonetheless, the term "jihad" is surely one of the most powerful terms in the Muslim psyche. "It evokes the legitimate self-defense struggle of the Prophet and his followers in the glorious days of early Islam. What can be more powerful and more moving to the downtrodden masses in the contemporary Muslim world than jihad?"[94] In this era of global communications, these masses can see what the modern world has to offer them and of what then they are deprived. Cherif Bassiouni[95] argued, "if these masses could also see how frequently, how improvidently, and how dubiously the term jihad has been used by unqualified political violence proponents, their reactions may well be different."[96] The resort to force as part of jihad in the early days of Islam was justified by self-defense and by the fact that Muslims had no freedom to propagate Islam or to practice it freely in non-Muslim controlled areas. However, it must also be said that the history of Islam is characterized by recurring violence claimed to be justified by jihad, even when it was not. Indeed, Bassiouni correctly argued that "[w]hatever justifications may have existed throughout the history of Islam, jihad in the name of the propagation of the faith can no longer be sustained in an era where freedom of religion, practice, thought, and speech are internationally guaranteed human rights."[97] He added,

> Thus, conflicts such as those between Palestinians and Israelis and between Chechnyans and Russians cannot be characterized as jihad, since they do not involve the religion of Islam. These conflicts are

92. Bassiouni, *supra* note 30, at 141.

93. *Id.* at 142.

94. *Id.* at 143

95. Distinguished Research Professor of Law and President Emeritus, International Human Rights Law Institute, DePaul University College of Law.

96. Bassiouni, *supra* note 30, at 143.

97. *Id.* at 145.

> controlled by other aspects of Islamic law, which also recognizes in these cases the applicability of positive law, namely, international humanitarian law.[98]

A mixed record is the history of Jihad in Islam.[99] Quite clearly, it is subject to interpretation, and has been subject to manipulations as well, essentially for political reasons or in order to achieve a political goal. Bassiouni reasoned the existence of a contemporary doctrinal approach to Jihad because of the fact that there was a mixed record and different interpretations. He further suggested that Jihad is equivalent to the international law of self-defense, and hence a doctrine subject to the same limitations on the methods and means of warfare in accordance with contemporary international humanitarian law.[100]

> This verse and others evidence the universality of humankind, notwithstanding its diversity. Other verses of the Qur'an reveal that man was created with the spirit of the Creator. How then can a believer in Islam engage in killing, torturing, and humiliating another human being created by God and infused with His Divine Spirit? No political doctrine of jihad can override this higher religious value. And yet tragically, this higher religious and humanistic value is violated with scant reaction from the Muslim religious establishment and from knowledgeable secular Muslims intellectuals. Jihad, like many other aspects of Islam, has its theoretical and practical aspects, both being frequently quite apart from one another. In fact, both dimensions are fragmented as they reflect a much greater diversity in Islam than its proponents tend to reflect in their words. Perhaps all concerned should heed to a hadith by the Prophet: "if you see a wrong: you must right it with your hand, if you can or your words or with your stare, or in your heart, but that is the weakest of faith."[101]

The doctrine of jihad is central to Islamic international law. "[T]here are disagreements among jurists regarding the nature of jihad in Islam. Some argue that it is essentially defensive in nature, whereas others are inclined to consider it as offensive or aggressive element."[102] However, as Ali and Rehman presented in their paper, "the introduction of the *dar-al-sulh* as a third category of states in Islamic international law opens up the possibility of building upon options of peaceful settlement of disputes in the Islamic tradition."[103] Additionally, Islamic law, with its principles, could enrich international law in general, and in particular, could be very relevant to the current war on terrorism.

3. Forbidden Acts

Islamic law provides for extensive protections of diplomats, restricts the

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 145-46.
102. Ali & Rehman, *supra* note 62, at 333.
103. *Id.* at 334.

taking of hostages, and prohibits unnecessary destruction of an enemy's real or personal property. "Muslim jurists hold the rights of diplomats to be inviolable. Kidnappings or assassinations of foreign envoys have historically been prohibited by Islam... the safety and dignity of diplomats are sacrosanct."[104] Sharia has certain rules in respect to hostages during Muslim conquests. Exchange of hostages for Muslims is encouraged. Human life and personal property are sacred under Islam, principles of Sharia entrenched numerous rules applicable to non-combatants, fields and forests.[105] In addition:

> Respect for human life and personal property is a fundamental principle of Shari'ah. No non-combatant may be killed, unless purposefully used to shield the enemy, or unintentionally fired during a night-time or distant catapult attack. Fields are not to be unnecessarily spoiled, and forests may not be needlessly destroyed. Most importantly, even active combatants themselves are afforded certain fundamental protections at all time.[106]

Islamic terrorists are no more representative of Islam than any fundamentalist terrorists are of their broader community. The U.S. should not

> [F]ail to make a distinction between fanatics, with a total disregard for life, who pose threat to all of humankind–irrespective of religion, culture or ethnicity-and those who simply have different ways of organizing their lives or different cultural preferences, but share the same basic goals and aspirations of all mankind: the pursuit of life, liberty and happiness.[107]

Islam itself promotes raising the standard of living of Muslims, calling for peace and full submission to the will of the Almighty. Separating Islam from terrorism is a must to understand the extent of the problem; Muslims should be engaged in the war on terrorism not as enemies but as partners.

Additionally, the tenets of Islamic jurisprudence are relevant to efforts to combat international terrorism and condemn terror violence. Terrorists invoking Islam have acted illegally, and this is as abhorrent to an Islamic state as it is to the west. Sharia is almost forgotten as one of the most effective instruments against international terrorism. It provides a genuine, workable framework for countering international terrorism. It includes a wide range of interweaving legal theories, drawing together treaty making authority, military constraints, and an insistence upon human rights. Westerners can no longer overlook the importance of Sharia in combating terrorism. Up until now, international law has witnessed "little attempt to take on broad concepts of as-siyar in discussions on the law of nations, [human rights and laws of war].... [The] "rules of Islamic international law could be

104. Schwartz, *supra* note 75, at 648-49.

105. *Id.* at 649.

106. *Id.* at 650.

107. United Nations Chronicle Online Edition, *An International Perspective on Global Terrorism*, DEPARTMENT OF PUBLIC INFORMATION, Nov. 3, 2001, *available at* http://www.un.org/Pubs/chronicle/2001/issue1/0103p71_2.

applied to build a better and more effective international legal order."[108]

II. FREE TRADE AS A TOOL IN COMBATING TERRORISM

The globalization of the Middle East has been confronted by much resistance among the populace in the region, who accuse globalization of being a western product that has to be rejected. However the people should know that globalization already took place and that there is no way out except to be a part of this game. It is better to be inside setting the rules of international trade than outside and forced to play by them anyway. Globalization has to take place in the Middle East. "[T]he increased involvement of the WTO, multinational corporations, international aid agencies, non governmental organizations, and foreign investors focusing on the development of non-oil industries through a process of market diversification and stabilization will improve the lives of those living in the Middle East," thus rooting out all the causes of terrorism.[109] Consequently, the frequency of terrorist attacks will be eliminated or at least lessened.

> International trade is thus a vital engine for poverty-reducing growth. Trade liberalization is one of the few policies that virtually all economists can agree on. It creates wealth. It reduces poverty. It is a zero sum game. The countries... that have intensified their links with the global economy through trade have tended to grow more rapidly over a sustained period....[110]

On the legal aspect, free trade and trade liberalization in general would be a catalyst for improving the deficient legal regulatory rules and systems in the Middle East and facilitate the legal integration of the WTO as well. The Middle East will count on the U.S. to bring in free trade, as Americans are the pioneers of the creation of a global framework for free and fair trade.[111] However, some scholars have argued that globalization is increasing transnational terrorism and that "openness is likely to increase the vulnerability of rich target economies both directly and indirectly."[112] If trade integration has a multilateral nature, terrorism also does. For example, there has been a spillover of terrorism from the U.S. to the UK and Spain as they joined the initial coalition against terrorism.[113]

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108. Ali & Rehman, *supra* note 64, at 342.

109. Fandl, *supra* note 32, at 591.

110. Delissa A. Ridgway and Mariya A. Talib, *Globalization and Development-Free Trade, Foreign Aid, Investment and the Rule of Law*, 33 CAL. W. INT'L L.J. 325, 334 (2003).

111. *See e.g.*, Susan C. Schwab, *The President's Trade Policy Agenda*, Mar. 1, 2007, at 25, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file629_10624.pdf.

112. Daniel Mirza & Thierry Verdier, *International Trade, Security, and Transnational Terrorism: Theory and Empirics* 25 (World Bank Policy Research Working Paper, Paper No. 4093, 2006), *available at* http://ideas.repec.org/p/cpr/ceprdp/6174.html.

113. Id.

A. Regional Agreements in the Middle East

The Middle Eastern region represents the least integrated region in the global economy.[114] Yet there are few prospects for regional agreements. For the most part they are still mere projects. The Maghreb Union, GCC, Euro-Mediterranean and GAFTA are the only regional agreements currently in existence.

1. The Arab Maghreb Union (AMU)

The Maghreb countries which consist of Algeria, Libya, Morocco, Mauritania and Tunisia, established the Arab Maghreb Union in 1989.[115] This union comprises 62 million people "within a region that is rich in oil, natural gas and minerals."[116] The Union treaty calls for strengthening economic ties between the member states to allow for the free movement of goods, services and production factors.[117] Although the member states announced plans for a custom union by 1995, it was never achieved.[118]

2. The Gulf Cooperation Council (GCC)

GCC was established in 1981. The Council consists of 6 member states: United Arab Emirates, Bahrain, Qatar, Saudi Arabia, Oman and Kuwait.[119] The aim of the establishment of the GCC can be deduced from the Charter's preamble: "[t]o effect coordination, integration, and interconnections between them in all fields."[120] GCC represents the most ambitious sub regional Arab agreement. However, there are many challenges facing the GCC. "Member states should have the necessary political will and should subordinate their systems to the Cooperation Council to build a strong regional block."[121] GCC also has a very ambitious plan to create a custom union and a union currency within the upcoming years.[122]

3. Euro-Mediterranean Partnership (EMP)

The EMP was created on November 28, 1995 in Barcelona when the Barcelona Declaration was signed by the EU and 12 Mediterranean Countries, also known as the Barcelona Process, which aims at a wide framework of political, economic and social relations between the EU and partners from the Southern Mediterranean region.[123] "Its stated aim is to create a new political and economic

114. Andrä Gärber, *The Middle East and North Africa: A Gridlocked Region at a Crossroads*, COMPASS 2020, Jan. 2007, at 5, *available at* http://library.fes.de/pdf-files/iez/04746.pdf.

115. Robert W. McKeon, *The Arab Maghreb Union: Possibilities of Maghrebine Political and Economic Unity, and Enhanced Trade in the World Community*, 10 DICK J. INT'L L. 263, 263 (1992).

116. *Id.* at 263-64

117. Mohamed Finaish & Eric Bell, *The Arab Maghreb Union*, INTERNATIONAL MONETARY FUND: MIDDLE EASTERN DEPARTMENT, May 1994, at 5.

118. Fandl, *supra* note 34, at 622.

119. Amr Daoud Marar, *The Cooperation Council for the Arab States of the Gulf*, 10 L. & BUS. REV. AM. 475, 475 (2004).

120. Charter of the Cooperation Council for the Arab States of the Gulf, art. 4, May 1981, *available at* http://www.gcc-sg.org/eng.

121. Marar, *supra* note 119, at 491.

122. *Id.* at 482.

123. Jacqueline Klosek, *The Euro-Mediterranean Partnership*, 8 INT'L LEGAL PERSP. 173, 173

force in the Mediterranean based on free trade and closer political cooperation."[124] More than ten years after the Barcelona process, it is obvious that the economic and institutional deficits in the Arab countries are essential, and fundamental reorganizations of the structures are necessary to achieve the Barcelona goals[125] of increasing economic integration between industrialized European countries and neighboring developing countries in the Middle East. Given its close proximity, it is clear that the EU has a great interest in the Middle East region. The primary goal of the EMP is to foster economic growth through free trade. However, the coverage of the EMP includes "a political and security partnership aim[ing] at creating a common area of peace and stability... [and] anticipate[s] a social, cultural and human partnership designed to increase exchanges between the civil societies of the countries taking part in the EMP."[126]

4. Great Arab Free Trade Agreement (GAFTA)

The center-piece of the Economic integration between Arab countries,[127] GAFTA derives its importance from many aspects. Six decades have witnessed more failures than accomplishments in Arab economic integration.[128] However Arab leaders have put it on the top of their political agenda for the coming Arab summit in 2008.[129] GAFTA currently enjoys more political support than ever before. This agreement was limited to trade in goods when it was signed in 1997, yet the third wave of the Arab economic integration signifies a movement towards expanding the scope of the agreement to cover trade in services as well.[130] The challenges are enormous. Most of them are of an economic nature but economic integration remains an indispensable matter for Arab countries. Otherwise they will fall behind.

B. U.S. and Free Trade Agreements in the Middle East

The 9-11 commission report recommended that "a comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future."[131] U.S.

(1996), (The 12 countries are: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey and Gaza Strip/West Bank).

124. *Id.*

125. *Id.* at 176.

126. *Id.* at 175.

127. CATCHING UP WITH THE COMPETITION: TRADE OPPORTUNITIES AND CHALLENGES FOR ARAB COUNTRIES 6 (Bernard Hoekman & Jamel Zarrouk eds., The Univ. of Michigan Press 2002). Decree No. 365 called on Arab leaders to have an Arab summit to discuss the economic integration among Arab countries.

128. *See generally*, ARAB ECONOMIC INTEGRATION: BETWEEN HOPE AND REALITY 13 (Ahmed Galal & Bernard Hoekman eds., Brookings Inst. Press 2003).

129. Last Arab Summit was held in Riyadh 28/29 March, 2007, it is the 19th summit where the Arab Leaders issued a decree no 365, this decree called on convening an Arab summit devoted entirely to discuss the economic, social and development issues in the Arab world.

130. Mona Garaf, Egyptian Services Sector at the Bilateral, Regional and Multilateral Levels, presentation before the American Chamber of Commerce (July 18, 2006) (on file with author).

131. MARY JANE BOLLE, MIDDLE EAST FREE TRADE AREA: PROGRESS REPORT, CRS Report for

free trade agreements in the Middle East "pursue economic policies in a... political cauldron," more than elsewhere in the world.[132] The Middle East initiative is "a systematic plan with well identified precursor economic relationships between the U.S. and 14 Middle Eastern and four North African" countries.[133] Robert Zoellick, former U.S. Trade Representative, mentioned that the U.S. aim is to fight terrorism "by spreading the message of prosperity and democracy throughout the world."[134] The Bush Administration's 2002 National Security Strategy identifies "free trade and free markets" as the keys to a secure America and the necessary components of the national security strategy.[135] The U.S. National Security Strategy pointed out that "[e]conomic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reforms, and the fight against corruption, and it reinforces the habits of liberty."[136] The MEFTA initiative rests on a fundamental premise: "national security can be enhanced and terrorism can be fought with trade," jobs, technology transfers, investment growth and modernization, which are thought to follow from the "free flow of goods, services, knowledge and capital."[137]

The events of September 11, 2001, demonstrated that weak states, like Afghanistan, can pose as great a danger to U.S. national interests as strong states. Poverty does not make poor people into terrorists and murderers.[138] Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders. Free trade and free markets have proven their ability to lift whole societies out of poverty. Therefore, the United States must work with individual nations, regions, and the entire global trading community to build a world that trades in freedom and therefore grows in prosperity.[139] The international community has an enormous stake in the developments within the Middle East and has no real alternatives but to engage the region in the hope of reaching mutually beneficial outcomes. Jennifer Moore argues that the problems of poverty and underdevelopment in the Middle East have been compounded by the war on terror, and that the substantial reliance on military force as opposed to alternative means of fighting terrorism "potentially feeds

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Congress, RL32638, at 5 (2006), *available at* http://vienna.usembassy.gov/en/download/pdf/mefta.pdf.

132. Ralph Folsom, *Trading for National Security? United States Free Trade Agreement in the Middle East and North Africa*, at 1 (U. of San Diego Sch. of L., Legal Stud. Res. Paper Series No. 07-113, 2007).

133. *Id.* at 8. The Middle East countries are Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab of Emirates, and Yemen (Cyprus, the Gaza Strip and West Bank are also potential MEFTA partners). The North African countries include Algeria, Libya, Morocco and Tunisia.

134. Paul Magnusson, *A Man of Many Missions*, BUSINESS WEEK, Mar. 31, 2003, at 94-95.

135. Daniella Markheim & Anthony B. Kin, *Free Trade with the UAE Supports America's National Security Interests*, THE HERITAGE FOUNDATION, Mar. 4, 2006, *available at* http://www.heritage.org/Research/TradeandForeignAid/wm1006.cfm.

136. *Id.*

137. Folsom, *supra* note 132, at 32.

138. Fandl, *supra* note 3, at 306.

139. Fandl, *supra* note 32, at 606.

ongoing conflicts rather than repressing them."[140] Additionally, the poverty and underdevelopment that existed in the Middle East prior to recent foreign intervention may have been exacerbated by the military actions against Afghanistan and Iraq.

In his article, Kevin Fandl mentioned that "[s]ome members of the international community, while supportive of U.S. efforts in the war on terror in many respects, believe that the war is actually increasing terrorism."[141] French and German attitudes toward the war on terror were surveyed by a Research center (PEW), which found that a majority of people "believed that the Iraq war had undermined the struggle against terrorists and doubted the Bush Administration's sincerity in trying to combat terror."[142] Lakdhar Brahimi, the United Nations Special Envoy to Iraq, stated in April 2004 that "there is no military solution to the problems in Iraq, and that the use of force, especially the excessive use of force, makes matters worse and does not solve the problem."[143] Daniel Benjamin and Steven Simon of Georgetown University recently affirmed that the number of Jihadists increased after the last war in Iraq, thereby increasing the long-term threat of terrorism.[144] Further, "[i]t is simply no longer possible to maintain that the United States is winning the war on terror."[145] Military intervention is often a poor preventative measure against terrorism because the military is ill-equipped to address the modus operandi of terrorists. The idea of democratizing the Middle East is good, but unlikely to succeed without the social, economic, and demographic conditions necessary for sustainability. Benjamin and Simon conclude that broad reforms and a stronger international coalition are the most effective solution to the current quagmire.[146] However, I find myself disagreeing with them. Democratizing the Middle East is a very naive idea, which sounds arrogant from the American side and does not relate to the cultural and historical background in this area of the world.

Fandl correctly argued that "The terrorist networks are... a significant threat to world security not only because of the suicidal methods they employ, but also because of the status of the countries where these networks recruit new members, engage in training exercises and where the leadership seeks refuge."[147] He elaborated by saying that most of these countries are developing countries, lack the resources and the political structure to take preventive measures in order to sustain

140. Jennifer Moore, *Collective Security with a Human Face: an International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 DENV. J. INT'L L. & POL'Y 43, 43 (2004).

141. Fandl, *supra* note 3, at 306.

142. Susan Sachs, *Poll Finds Hostility Hardening Toward U.S. Policies*, N.Y. TIMES, Mar. 17, 2004, at A3.

143. John F. Burns, *Iranians in Iraq to Help in Talks on Rebel Cleric*, N.Y. TIMES, Apr. 15, 2004, at A1.

144. DANIEL BENJAMIN & STEVE SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT xiv (Times Books 2005).

145. *Id.* at 126.

146. *Id.* at 197-208.

147. Fandl, *supra* note 32, at 597-98.

peace and crackdown on these organizations.[148] Although the Bush administration realized the link between desperate economic circumstances and terrorism, they have chosen to counter the terrorist attacks primarily by military conquest. Four years after the Iraqi invasion, many Americans support the view that using force may not be the best solution to uproot terrorist organizations. Terrorists are non-conventional actors who support their non-conventional weapons by selling ideology to seek new fellows. Osama Bin laden's capture or even death will not end the terrorist attacks; his ideas are still there and have an enormous impact on the people who live in impoverished and desperate conditions in the Middle East.

The opening of markets in the Muslim world is desperately needed.[149] According to Brink Lindsey of the Cato Institute,

> Trade and investment barriers are pervasive, and exports other than oil remain puny....It is now clear that Americans live in a dangerous world—and that the primary danger at present emanates from the economic and political failures of the Muslim world... Those failures breed the despair on which violent Islamic extremism feeds; no comprehensive campaign against terrorism can leave them unaddressed... The national security dimension of trade policy is once again plainly visible... It's true that scrapping protectionist policies, by itself, will not guarantee economic revitalization. But the fact is that integration into the larger world economy has been central to every developing country success story of recent times. Exposing the economy to foreign competition and capital acts as a catalyst for more systemic reforms. And over the longer term, such far-flung examples as Chile, Mexico, Taiwan, and South Korea demonstrate the interconnectedness of globalization, economic dynamism, and eventual democratization. Meanwhile,... the West can do more to facilitate Muslim countries' participation in global commerce... President Bush has made it amply clear that fighting terrorism is the overriding priority of his administration. To wage that fight with maximum effectiveness, he will need to convince Congress and the nation that promoting world trade will help to defeat the destroyers of the World Trade Center.[150]

Establishing free trade in this area would increase job opportunities, economic growth, cut poverty and enhance the rule of law in the Middle East; development in the Middle East should be a major component of U.S. foreign policy.[151] Economic development in the Middle East is the most effective means of maintaining peace and increasing normalization, thereby breaking the cycle of mistrust, violence, and instability that plagues the Middle East. A positive cycle of economic expansion would enhance the region's political stability, which would

148. *Id.* at 598.

149. *Brink Lindsey, Free Trade and Our National Security, WASHINGTON TIMES, Dec. 5, 2001, available at http://www.freetrade.org/node/244.*

150. *Id.*

151. Fandl, *supra* note 32, at 617-21.

then foster economic growth by bolstering investor confidence. Economic opportunities are enormous in the Middle East.[152] Furthermore, "the Middle East is situated in a strategic global position featuring many dynamic trade and investment opportunities."[153] It has been argued that political and economic stability can be created if the U.S. and Middle Eastern countries make certain conditions conducive to the following economic measures:[154]

(1) Increased foreign private investment

(2) Increased free trade agreements between the U.S. and Middle Eastern countries.

For most Arab countries, trade with the EU is a multiple of trade with the U.S. However, the U.S. is far more strategically important than trade figures alone would indicate.[155] Moreover, the U.S. differs from the EU as the first advocates for behind the border issues including environmental and labor rights protection. These two issues rank prominently on the U.S. negotiating agenda for any FTA.[156] Furthermore, unlike the Euro-Med agreements that tend to be drafted in vague language, the template for American bilateral agreements is a highly specific and enforceable legal document. In general, any preferential trade agreement with the U.S. would result in more consequential commitments than an EU-Med agreement would.

C. The Rise and Fall of MEFTA

MEFTA is the first attempt to increase the scope of U.S. attention towards the Middle East beyond the Israeli-Palestine, Palestine-Hezbollah and Iraq/Iran-U.S. conflict. President Bush, in a speech at the University of South Carolina, proposed creating a comprehensive free trade area between the U.S. and the Middle East (MEFTA) within a decade.[157] In his speech, President Bush mentioned that the "Arab world has a great cultural tradition, but is largely missing out on the economic progress of our time. Across the globe, free markets and trade have helped defeat poverty, and taught men and women the habits of liberty. So I propose the establishment of a U.S.-Middle East free trade area within a decade, to bring the Middle East into an expanding circle of opportunity, to provide hope for the people who live in that region."[158]

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152. Daniel Lubetzky, *Incentives for Peace and Profits: Federal Legislation to Encourage U.S. Enterprises to Invest in Arab-Israeli Joint Ventures*, 15 MICH. J. INT'L L. 405, 410 (1994).

153. John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 414 (2005).

154. Roni N. Halabi, *Stability in the Middle East Through Economic Development: An Analysis of the Peace Process, Increased Agricultural Trade, Joint Ventures, and Free Trade Agreements*, 2 DRAKE J. AGRIC. L. 275, 295-96 (1997).

155. Robert Z. Lawrence, *Recent U.S. Free Trade Initiatives in the Middle East: Opportunities but no Guarantees* 4-5 (John F. Kennedy Sch. of Gov't Fac. Res. Working Paper Series, Paper No. RWP06-050, 2006), *available at* http://ssrn.com/abstract=939656.

156. *Id.*

157. *Id.* at 2.

158. President George W. Bush, Remarks at the University of South Carolina (May 9, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030509-11.html.

MEFTA negotiations will take place bilaterally with countries in the region, which will then be combined into single overreaching arrangements between U.S. and the region as a whole.[159] On the one side, the U.S.'s interest in this agreement is primarily geopolitical and security. On the other side, the interest of Arab countries is primarily economic. Robert Lawrence of Harvard summed four primary economic advantages for this free trade.[160] The first is increased trade and investment, second is reducing trade diversion that results from other preferential arrangements, such as EU-Med agreements by enhancing the bargaining power of Arab countries with other countries that wish to be accorded similar treatment to U.S.[161] Third is deepening the regional economic integration either between all Arab countries or a select group of Arab countries to launch a regional integration.[162] The efforts of increasing the integration of the Middle East in the global world would include the establishment of this area within a decade, reform efforts to prime countries in the region for WTO membership, trade capacity building for integration into the global trading system, reform of commercial and judicial codes, and improved transparency to fight corruption. There are certain prerequisites for participation in MEFTA. Countries in the region may have to join the WTO, enter into bilateral trade and investment framework agreement and BIT with the U.S. with an additional requirement to abandon all primary, secondary, and tertiary economic boycotts of Israel organized by the Arab league.[163]

Deep-integration free trade agreements are a potentially useful mechanism for leveraging and locking in domestic reforms.[164] Informal barriers to trade such as monopoly public sector service providers and problematic customs administration and attendant corruption significantly hamper cross border integration, and U.S.-style deep integration agreements may be useful in reforming these practices in a way that the shallow integration initiative of the Euro-Med almost surely cannot.[165] Yet preferential trade agreements cannot remake legal and educational systems, enhance work habits, protect environments, encourage human rights and respect for minorities, and all the other collateral benefits without shifts in how Arab governments perceive their leadership and management functions. But they can be helpful and may be sufficient for defining a workable template for low risk options that move Arab regimes with more confidence to face the severe challenges of the coming decades.[166]

Although MEFTA, like CAFTA, NAFTA and other U.S. FTAs, is about trade, investment and technology, some commentators have argued that MEFTA,

159. Lawrence, *supra* note 155, at 2.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* Arab boycott is Primary in the sense that all trade with Israeli companies is banned. Secondary in the sense that doing business with firms that contributes to Israel's military or economic development is also forbidden. Tertiary in the sense those foreign companies with ties to Israel have been blacklisted.

164. *Id.*

165. *Id.* at 17-8.

166. *Id.* at 23.

because of the location and national security of U.S., "is really about terrorism and security, including oil security."[167]

D. Recent Developments in MEFTA

Since the invasion of Iraq, in an attempt to improve the political stability in the region, the U.S. has sought to increase trade and investment in the Middle East. "By creating trade and investment framework agreements (TIFAs), Bilateral investment treaties (BITs), and Free Trade Agreements, the United States has sought to enhance its economic stake in the Middle East in order to improve long-term diplomatic relations and stability in the region. Since the launching of the MEFTA, the Bush administration has signed [TIFAs] with Saudi Arabia, Egypt, Kuwait, Bahrain, the United Arab Emirates, Qatar and Oman. [TIFA] are intended to protect investors and intellectual property, and promote commercial transparency and efficiency." [168] Additionally, the U.S. has "worked to expedite accession to the WTO with nations such as Saudi Arabia and Lebanon. The Bush Administration hopes that such initiatives will eventually lead to the establishment of a Middle East free trade area by 2013. The [U.S.] is attempting to create this free trade zone by actively supporting WTO membership for countries like Saudi Arabia and Lebanon, and helping current Middle Eastern WTO members implement trade agreements."[169] Commentators have noted that "increased trade and investment in the region will facilitate growth, job creation, and a dynamic economy that no longer depends on oil."[170] In addition to the free trade agreements, the U.S. has concluded Qualified Industrial Zone agreements (QIZ) with the Palestinian Authority, Jordan and Egypt. These QIZ agreements provide for preferential access to the U.S. market for qualifying goods by meeting local content requirements specified in terms of U.S., Israeli, and the third country's input content.[171]

While Mary Jane Bolle of the Foreign Service, Defense and Trade division in the State Department argues for MEFTA, adding that MEFTA is a catalyst for economic development in the Middle East,[172] other commentators take a contrary approach and argue against MEFTA. They confirm that the current structural impediments to intra-regional economic cooperation will inhibit the prospects of an integrated Middle East economic system.[173] Therefore, MEFTA will create a hub and spoke relationship. A hub and spoke MEFTA could potentially divert foreign investment away from the Middle East, as investors would prefer to set up manufacturing or services facilities in the U.S. and get duty free access to all of the

167. Folsom, *supra* note 132, at 30-31.

168. Donboli & Kashefi, *supra* note 153, at 456-57.

169. *Id.* at 458.

170. *Id.*

171. Noland & Pack, *supra* note 14, at 222-23.

172. MARY JANE BOLLE, MIDDLE EAST FREE TRADE AREA: PROGRESS REPORT, CRS Report for Congress, RL32638, at 11 (2006), *available at* http://vienna.usembassy.gov/en/download/pdf/mefta.pdf.

173. Bessma Momani, *A Middle East Free Trade Area: Economic Interdependence and Peace Considered*, 30 WORLD ECON. 1682 (2007).

Middle East spokes.[174]

The breakdown of FTA negotiations with the UAE signifies the strategy of the Bush administration of picking off easy partners. Morocco, Bahrain and Oman are not significant U.S. trade partners. The political firestorm which took place after the state owned Dubai ports acquired a British company operating six seaports in 2005, the Dubai ports world promised to sell the interest to an unrelated U.S. buyer after Congress, the press and a substantial portion of the U.S. public strongly opposed the takeover. Following this, free trade negotiations with UAE have been put on a back burner.

So far, MEFTA includes four members. Economically speaking, it is insignificant. Major trade partners and key players in the Middle East still fall out of MEFTA's reach; Egypt, Turkey and Saudi Arabia are examples of this. In his article, Folsom argued that trade has become a cover for U.S. national security needs and goals, and termed MEFTA as an attempt act creating a law of comparative security advantage.[175]

The military component of the U.S. counter-terrorism approach is aggravating the terrorism problem across the Middle East and increasing the Anti American sentiment. Thinking of alternative options to combat terrorism will remain at large through unorthodox means as the nature of international terrorism is itself unconventional. The Bush Administration has to revive the MEFTA; national security is inextricably linked to free trade and development in the Middle East. One question is whether free trade would root in the current regimes in the Middle East. This would defeat the whole purpose of an open market, and the elite will continue to control the resources of the whole country, poverty will increase, and the regimes will be more brutal in oppressing the people. However one caveat is that U.S. administration has to add a political reform component to its free trade package which will circulate across countries in the region. The link between democracy/political reform and signing of free trade agreements should not be separated. The U.S. has to support the secular opposition forces in these countries, requiring more participation in the civil society and engaging Muslim oriented political groups.

If MEFTA does not to proceed in the Middle East, one can say that a significant portion of the generation in the Muslim world will face conditions that would fulfill Al-Qaeda's dream of recruiting hundreds of thousands of poorly educated people. These generations would be living in crowded mega cities and will become attractive recruits for radical groups and organizations that are alienated from the global economic, social and political system. This generation will grow up angry and will seek someone to blame, in a political atmosphere in which their impressions of the U.S. will be largely shaped by Abu Ghraib and Guantanamo photos or stories. The war on terror will not be won through any territorial conquest or individual's capture. It will only end in the realm of perceptions, when the U.S. and the Muslim world see each other not as in conflict

174. *Id.*

175. Folsom, *supra* note 132, at 31.

but as operating toward shared goals, mainly, development, political reform, international peace and free trade. A mutual cooperation between the Muslim world and the U.S. is the key to victory in the war on terrorism. The U.S. has to reinforce local reforms, efforts and avoid being seen as meddling in the internal affairs by supporting a certain power over another.[176]

III. INTERNATIONAL LAW AND TERRORISM

This part is divided into two sub-parts. The first will examine the widely held view that international law does not provide a definition of terrorism, compares this approach with the terrorism definition in the domestic legal system of the United States and in the Middle Eastern jurisprudence, and the different international instruments that deal with terrorism. The second part suggests that the U.S. should engage the Muslim world in the war on terror and discusses how the international community can be engaged in the war on terror in the Middle East.

A. Terrorism in International Law

The war on terrorism has exposed some cracks in the foundation of international law;[177] a series of deficiencies in international law were demonstrated by the attacks of September 11. These include, but are not limited to: (a) The absence of a comprehensive international legal framework to address terrorism; (b) The absence of adequate international criminal law infrastructure to address massive crimes against humanity and/or acts of war, particularly by non-state actors; (c) The absence of sufficient international legal mechanisms for regulating, monitoring, prosecuting, and punishing non-state actors; and (d) The absence of international policing capacities and adequate cooperative arrangements to undertake intelligence gathering and crime prevention at the international or multilateral level.[178] Terrorism raises a lot of questions in international law about self-defense, the law of armed conflict, and the definition of terrorism and reprisal.[179] However discussing all these issues is beyond the scope of this article.

Although terrorism is the most regularly used word in the world now, still there is no consensus among the international community on the definition for this term. Nonetheless, the definition of terrorism in both U.S. and Middle East jurisprudence are the most relevant in reaching an agreement between the two worlds. The main obstacle to creating a coherent international approach for combating terrorism is the absence of an agreed definition.[180] The first attempt to define terrorism in the 1937 Terrorism Convention failed. Its abstract definition was not acceptable to states, at least partially due to the difficulty of implementing

176. Lawrence, *supra* note 155, at 20.

177. Tung Yin, *Ending the War On Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 152 (2005).

178. Ved P. Nanda, *Foreword: Combating International Terrorism*, 31 DENV. J. INT'L L. & POL'Y vi, vii-viii (2002) (highlighting actions taken in the wake of 9-11 terrorist attacks).

179. *See e.g.*, Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1408-09 (2002).

180. BARRY E. CARTER ET AL, INTERNATIONAL LAW 1020 (5th ed. 2007).

the definition in domestic legislation.[181] Similarly, the U.S. draft in 1972, which defined terrorism in the abstract, did not attract sufficient support to be opened for signature.[182] Rather than continue to attempt to establish a universal jurisdiction with respect to terrorism, the international community, through conventions and Security Council and General Assembly resolutions, opted for a system whereby states exercise domestic criminal jurisdiction over acts of terrorism. This incremental criminalization has produced a list of disparate proscribed acts reflecting those acts that most harm states' interests but upon which agreement can be reached. Historically, there have been many international conventions and agreements that have condemned terrorist acts, including hijacking, hostage taking, and terrorist bombing.[183] The UN, out of a recognition of the politics associated with reaching an acceptable global definition for terrorism, elected to avoid the term terrorism and have a rather piecemeal approach to terrorism.[184] Consequently, the UN carefully carved out very specific acts in selected international treaties to characterize as terrorism. The statement "one person's terrorist is another person's freedom fighter", still blocks a global consensus on a precise definition of terrorism.[185] For example, the suicide bombers who killed innocent civilians in Israel are terrorists in the west but freedom fighters in the Middle East. By the same token the use of force by Israel as a state and its killing innocent Palestinian civilians hold Israel as a state supporting terrorism in the Middle East but it has legitimacy in the west and is rarely criticized for its acts.

Despite the world's reaction to the events of September 11, 2001, there seems little chance that a comprehensive convention on terrorism will emerge from the UN in the near future. Terrorism is now used as a legal term, and thus should be accompanied by a legal definition. There are dangers in using terrorism as a legal term without defining it, as the widespread potential for (and some actual) avoidance and abuse of Security Council 1373's obligations illustrates.

Countries have responded to the terrorism question by taking matters into their own hands and fighting back with the use of armed force. These measures have proved ineffective against terrorism. International treaties are the best avenue to mobilize the international community towards certain issues such as terrorism; however, the UN has not been an effective mechanism in engineering a pragmatic solution to terrorism.[186]

With that in mind, elements of terrorism have to be mentioned so that we can

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181. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 36-37 (2006).

182. Ross E. Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the UN Process*, 16 B.U. INT'L L.J. 309, 317 (1998).

183. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 24-25 (1999).

184. Jeffrey F. Addicott, *Legal and Policy Implications For a New Era: The War On Terror*, 4 SCHOLAR 209, 213-14 (2002).

185. *Id.*

186. Mark Baker, *Terrorism and the Inherent Right of Self Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 27-28 (1987).

know precisely what elements spark all the differences and block every international consensus on a global definition of terrorism. Terrorism in the Middle East: Cherif Bassiouni, a prominent International criminal law professor in the U.S. and originally from Egypt, defines terrorism as "individual or collective coercive conduct employing strategies of terror violence which contain an international element or are directed against an internationally protected person" when:

(a) The perpetrator and victims are citizens of different states or

(b) Duly accredited diplomats and personnel of international organizations acting within the scope of their functions

(c) International civil aviation

(d) The mail and other means of international communications and

(e) Members of nonbelligerent armed forces.[187]

In the U.S., there are nineteen definitions for terrorism; a congressional subcommittee found out that every federal agency with a counterterrorism mission uses a different definition of terrorism.[188] Chapter 113B of title 18 deals with terrorism. 18 USCA § 2331(1) defines international terrorism as activities involving violent acts that constitute crimes in the U.S. that appear to be intended:

i. To intimidate or coerce a civilian population

ii. To influence the policy of a government by intimidation or coercion; or

iii. To affect the conduct of a government by mass destruction, assassination, or kidnapping and that occur primarily outside U.S. territorial jurisdiction or transcend boundaries in some way.[189]

Second, 18 USCA § 2332b, defines the federal crime of terrorism in (g)(5) as a breach of listed provisions of U.S. criminal law that are calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.[190]

Michael Reisman lays out three effects of terrorism: "an immediate effect of killing or injuring people; an intermediate effect of intimidating a larger number of people and influencing their political behavior of the government; and an aggregate effect of undermining public order.[191] However, the victims of terrorism are always innocent civilians, consequently any successful definition of this term should "concentrate on the act and not the political, religious, or social causes which motivate the act."[192]

187. M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES, at xiv (1975).

188. Young, *supra* note 181, at 76-77.

189. Federal Courts Administration Act of 1992, 18 U.S.C.A. § 2331 (West 2008) (hereinafter FCAA)

190. *Id.* at § 2332b.

191. Reisman, *supra* note 183, at 6-7.

192. Addicott, *supra* note 184, at 216.

The war on terrorism combines the elements of an international armed conflict and international criminal investigation. The creation of the legal framework for each of the hostilities is needed. Terrorism can either be treated as a criminal matter or an armed attack warranting response under the law of armed conflict.[193] Both approaches have some loopholes and do not fit the 9-11 attacks perfectly. The law of armed conflict does not appear to have anticipated the use of military force against non-state actors, thus the attacks are acts of war by non-state actors to be met with military force and direct application of the laws of armed conflict. This is the prevailing approach by President Bush and Congress. Wedgwood highlighted that the U.S. has failed to respond to Islamic fundamentalists' terrorism as a criminal matter and the solution is to treat terrorism as a matter of war and to be conducted within war rules, including humanitarian law.[194] This approach acknowledges that terrorism poses a new challenge to international rules relating to armed conflict, which also invokes a demand for the development of new legal regime effectively capable of addressing the threat of global terrorism.[195] By the same token, Mark Baker proposed rewriting article 51 of UN charter. He argues that the self-defense term has been stretched beyond any acceptable interpretation of article 51 in order to respond to terrorism. Consequently, he called on the UN and international community to adopt a stance against terrorism beginning with recognizing the legitimacy of the use of self-defense against terrorist attacks.[196] Or terrorist attacks constitute criminal acts to be addressed through international cooperation and the criminal justice system; however a meaningful prosecution of terrorists would have required that the U.S. gain physical custody of them. Abi Saab argues that 9/11 is not an act of war, but a criminal matter.[197] It should be dealt with in the framework of existing international law, largely the realm of international criminal law, and by addressing its root causes.

Some commentators have argued that terrorism should be included in the law of nations.[198] "The law of nations has recently been expanded to include war crimes. This inclusion is in response to international condemnation of the war criminal. With war crimes, numerous international agreements condemning war criminals exist[]."[199] "When conduct is universally condemned, the perpetrators of such conduct are subject to the principles of universal jurisdiction, which allows courts to prosecute offenders regardless of the situs of the event."[200]

International law has traditionally limited this category of offenses to

193. *See Id.* at 216, 219-20.

194. *See* Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103-19, (Andrea Bianchi ed., 2004).

195. Addicott, *supra* note 184, at 219.

196. Baker, *supra* note 186, at 45.

197. Georges Abi-Saab, *The Proper Role of International Law in Combating Terrorism, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM xiii, (Andrea Bianchi ed., 2004).

198. Michael Rosetti, *Terrorism as a Violation of the Law of Nations after Kadic v. Karadzic*, 12 ST. JOHN'S J. LEGAL COMMENT. 565, 582-84 (1997).

199. *Id.* at 591.

200. *Id.*

> the most heinous of crimes in an effort to prevent nations from subjecting their arbitrary rules on foreign nationals. The law of nations is the doctrine encompassing these violations. Courts look to the scope of the international community's condemnation and the work of jurists on the subject in making a determination of whether an activity violates the law of nations. Recent developments also indicate that private individuals as well as states can violate the law of nations.[201]

I believe that the UN should be energized to address the issue of reaching a consensus on a definition for terrorism. This definition should be a compromise between the definitions in the U.S. and Muslim world where little differences appear. With its spreading of democracy, development and free trade in the Middle East would be the best avenue to promote war and terrorism avoidance. The international community has to stress one legal anti-terrorist norm, "building through the drafting and ratification of international anti-terrorist initiatives and human rights...."[202] These international instruments like treaties have to be balanced and based on justice and acknowledge and absorb different perspectives.

B. Terrorism is an International Problem, not only an American Problem

After the attacks, the U.S. was expected to go for a more multilateral approach. Instead the U.S. felt it had to do its own work. However, terrorism should not be a subjective epithet which allows any one country to assert an absolute right to attack any other country or group that it dislikes. The UN remains the best forum for an objective and universally agreed definition. In his article, *Terrorism is the World's Problem,* Egyptian Ambassador Fahmy called on Americans to consider terrorism as a global not an American problem.[203] This conclusion and its consequences implies that Americans have to understand the global context of the war on terrorism.[204] The United Nations should be on the hook; international law should be used more frequently and developed by the state players to counter terrorism. The U.S. is a global power which has global opportunities and responsibilities and terrorists are individuals who attacked not only America but also who attacked other countries like Egypt, Spain, the UK and Indonesia.[205] Establishing a dialogue between the Muslim World and the U.S. is urgent, not only for securing peace in the Middle East, but also for making cultural adjustments and strengthening globalization. Since terrorism has taken place, moderate Muslims have not had the chance to either renounce the terrorist attacks or to express what they think about these attacks against innocent civilians. Americans have to realize that they can not win this war without the full engagement of moderate Muslims. Unilateral and one sided view of the problem will only aggravate the situation. This has been happening so far in Iraq.

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201. *Id.*

202. Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 367 (2003).

203. Nabil Fahmy, *Terrorism is the World's Problem*, 16 DUKE J. COMP. & INT'L L.157, 160 (2006).

204. *Id.*

205. *Id.* at 158-59.

In the first global reaction to September 11, 2001, the UN passed Resolution 1368, which specifically recognized America's inherent individual rights and collective self defense in accordance with the Charter and specifically called on states to work together "to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks."[206] Shortly thereafter, the Security Council passed another resolution, invoking its authority under Chapter VII of the United Nations charter, reaffirming the need to combat by all means terrorist acts that threaten international peace and security, requiring states to take steps to block terrorist finances and end any state support for terrorism, and calling on states to increase cooperative intelligence gathering and law enforcement efforts.[207] The U.S. failed to use the resources of the Security Council, thus "undermin[ing] the view that the council and the UN as a whole should be the primary vehicle to respond to threats to and breaches of the peace...."[208] The invasion of Iraq created a precedent that states may freely act outside the UN system.[209] Jonathan Charnay warned the U.S. about being involved in the war on terror without seeking the support of the Security Council. He went on to explain how the Security Council's involvement "could help build durable and broadly supported defenses against this threat."[210] Otherwise, the U.S. will fail to build a stable, long term coalition in support of its stated objective of suppressing international terrorism worldwide. A Commercial law Professor in Cairo Law School suggested the closing of Public International Law department at the law school and said that experts in international law should turn to other fields of law as international law no longer exists in the aftermath of the invasion of Iraq.[211] Kofi Annan announced that "we must never lose sight of the fact that any sacrifice of freedom or rule of law within states—or any generation of new tensions between states in the name of anti-terrorism—is to hand the terrorists a victory that no act of theirs alone could possibly bring."[212]

"Terrorists today have become more global because of freedom of movement, free flow of information and communications, and the ability to exploit loopholes in the spectrum of domestic laws between countries."[213] A lot of loopholes exist in domestic laws; these loopholes have to be filled by escalating domestic issues like money laundering, transfer of money on an international level. A transnational problem that spans virtually the entire world, terrorism is an international phenomenon which represents the downside of globalization. It requires a

206. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

207. S.C. Res. 1373, ¶¶ 1-3 U.N. Doc. S/RES/1373 (Sept. 28, 2001).

208. Jonathan Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 837 (2001).

209. Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom"*, 95 CAL. L. REV. 2295, 2338 (2007).

210. Charney, *supra* note 208, at 838.

211. Dr. Mokhtar Brairy, Cairo University, August 2004 (on file with author).

212. Press Release, Secretary-General, Menace of Terrorism Requires Global Response, Says Secretary-General, Stressing Importance of Increased United Nations Role, U.N. Doc SG/SM/8583 (Jan. 20, 2003).

213. Fahmy, *supra* note 203, at 168.

concerted, consistent and coordinated international cooperative framework to sustain a chance of eliminating this threat.[214] International law is the only mechanism to provide coordinating strategies and integration across countries rather than military collations and a binary division of states between good and evil. The latter would run the risk of aggravating the very international divisions that can most easily be exploited to coordinate further underground criminal and terrorist enterprises. "'Terrorism' no longer describes state conduct. It now refers to the acts of sub-state actors. Similarly, its function is no longer just a term expressing moral condemnation."[215] Furthermore, the international community needs to work together quickly and consistently on the world war on terrorism, a far reaching perspective of what the international community does by way of resolving these issues. America is the most powerful country in the world; however, it is not powerful enough to confront the new global challenges alone – the UN has to be more engaged. Strengthening norms that hold states accountable for criminal acts committed by terrorists operating from its territory, passing resolutions prohibiting the targeting of civilians, signing a treaty which will mandate a strong collective response to attacks on civilians are among the proposals. For the most part, the U.S. has so far been focusing on what Telhami termed the supply side of terrorism rather than the demand side. Ambassador Fahmy again mentioned that "terrorism is an international phenomenon that will only be defeated by collective efforts."[216]

On a related front, international law norms and principles have to be developed in combating terrorism, strengthening multilateral treaties and international legal instruments, engaging the Muslim world with the force of Sharia and cementing development and free trade projects in the Middle East, which would combine together to make headway in winning the war on terrorism. I completely believe that defusing terrorism should be a major topic in U.S. foreign policy. My theory is that terrorism will be eliminated only when countries deal with both the demand and supply side of terrorism. International trade law norms can be the most efficient tool to deal with the demand side of terrorism, while current international law norms have to be strengthened to deal with the supply side as well. The two sides complement each other. The U.S. along with the international community will have to go far in dealing with the supply side, while the current status of international trade is enough to deal with the demand side.

CONCLUSION

Winning the war on terrorism will only be feasible if the Muslim world and the U.S. realize that they have one common enemy. The U.S. -as a super power- strategically opted for a more unilateral approach which has proved to be a failure in combating terrorism. Moving back towards more a multilateral approach and

214. Asli Bali, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT'L & COMP. L. 403, 416 (2002).

215. Young, *supra* note 181 at 101.

216. Nabil Fahmy, *Perspectives On Terrorism From Asia, The United States, and The Middle East: The Global Challenges in the Middle East Region: An Egyptian Perspective*, 28 FLETCHER F. WORLD AFF. 145 (2004).

engaging the Muslim world would effectively contribute to this war. Addressing the root causes of terrorism is equally important as fighting terrorist organizations with military might. International law remains the mechanism which both the U.S. and the Muslim world could work together to enrich and develop.

The U.S. is clearly failing the cold war of ideology in the Middle East. A growing proportion of the Muslim youth embrace extremist views that could ultimately lead to increased terrorism. Although the CRS report acknowledges this, the report failed to highlight the best course in combating terrorism. The idea of bringing war to the enemy has unfortunately aggravated the situation in the Middle East. The Bush Doctrine of preemptive self defense has not appealed to the international community in general, let alone to the Muslim world. The report suggests that the military component is the primary tool in the nation's portfolio for combating terrorism; public diplomacy and economic inducement have received little attention in the report even though it is clear now that they are the best course to deal with the terrorism problem in the Middle East. I believe that the U.S. portfolio has to include a military component to disarm and fight terrorists; however, I largely disagree with the set of priorities which have been put in the report. This article is advocating for a change in the set of current priorities of the U.S. administration. Free trade, development, dialogue with the Muslim world and increasing globalization in the Middle East have to be the top priorities of U.S. portfolio of combating terrorism.